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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF
MONTANA TERRITORY

FROM THE AUGUST TERM, 1873, TO JANUARY TERM, 1877, INCLUSIVE.

BY
HENRY N. BLAKE
AND
CORNELIUS HEDGES.

VOLUME II.

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BY HENRY N. BLAKE and CORNELIUS HEDGES

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JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE:	APPOINTED:
HON. DECIUS S. WADE, - . .	- MARCH 17, 1871

ASSOCIATE JUSTICES:	APPOINTED:
HON. HIRAM KNOWLES,	JULY 18, 1868.
HON. FRANCIS G. SERVIS,	SEPTEMBER 21, 1872.
HON. HENRY N. BLAKE,	AUGUST 10, 1875.

OFFICERS OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

CLERK:
ISAAC R. ALDEN.

UNITED STATES MARSHAL:
WILLIAM F. WHEELER.

UNITED STATES ATTORNEY:
MERRITT C. PAGE.

REPORTERS:
HENRY N. BLAKE, APPOINTED JANUARY 9, 1872.
CORNELIUS HEDGES, APPOINTED AUGUST 9, 1875.

RULES OF THE SUPREME COURT,

ADOPTED SINCE THE JANUARY TERM, 1873.

January Term, 1874.

In all cases where an appeal has been perfected twenty days before the next succeeding term of this court, and the appellant has failed to file a transcript of the record on or before the first day of such term, the respondent may procure a transcript of the record and file the same in this court. The expense of procuring such record and filing the same shall be taxed as costs in the case.

Upon ten days' notice to the appellant or his attorney, specifying the fact that he has procured a transcript of the record in such case, and has, or will on a day named in said notice, file the same in this court, the respondent may apply to this court to set the cause for hearing, and upon such hearing this court may affirm, reverse, or modify the judgment or order of the court below, appealed from.

January Term, 1875.

It is hereby ordered that upon the receipt by the clerk of this court of a mandate from the supreme court of the United States in any case at law or in equity, theretofore taken from this court by writ of error or appeal to said supreme court, it shall be the duty of such clerk forthwith to issue, under his hand and the seal of this court, a remittitur to the district court of the district and in the county in which such judgment was rendered, commanding such court to take such action in the premises as, by the mandate from the supreme court of the United States, shall be proper, and the said remittitur shall also contain therein a recital

in haec verba of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

August Term, 1875.

The remittitur in each case on appeal shall embrace a certified copy of the written opinion of the court, and the judgment or order on appeal.

January Term, 1876.

The appellant shall deliver to the respondent a copy of his points and authorities at least two days before the commencement of the argument; and the respondent shall deliver to the appellant a copy of his points and authorities at least one day before the argument; and, at or before the commencement of the argument, both appellant and respondent shall furnish to each of the parties a copy of their points and authorities, and file the same with the clerk, or either party may file one copy thereof with the clerk, who shall cause the requisite copies to be made; and in case either party shall fail to furnish such copy to the opposite party, as required by this rule, he shall be deemed to waive his right to argue such case orally, except by leave of the court, and no brief of his points and authorities not filed in accordance with this rule will be considered by the court, except after at least one day's notice of the filing of the same, to the opposite party, who shall have such time as may be allowed by the court after the filing thereof to file a reply thereto.

All motions for rehearing shall be in writing, and filed within three days after the judgment is rendered or order made, and during the term at which the judgment or order is rendered or made. The court will examine the motion for rehearing without argument, and decide upon what questions, if any, counsel will be heard, and may deny the motion without hearing any argument.

ATTORNEYS AND COUNSELORS AT LAW,

LICENSED AND ADMITTED SINCE THE JANUARY TERM, 1878.

BLAKELY, CHARLES P.,
COLLINS, TIMOTHY E.,
DAVIS, WILLIAM F.,
EWING, CLARENCE O.,
FORBIS, JOHN F.,
GARRIGAN, OWEN,*
HILL, ROBERT W.,*
KANOUSE, JACOB A.,
KNIGHT, EDWARD W.,
LAYTON, WILLIAM H.,*
MAGUIRE, HORATIO N.,*

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POMEROY, THOMAS M.,
PORTER, BENJAMIN T.,
PORTER, HEZEKIAH M.,
PORTER, ISHAM B.,
TALLENT, PATRICK,
WILKINSON, EZEKIEL S.,
WILLETT, EDWARD W.,*
WOODY, FRANK H.,
YANCEY, CHARLES D.,*
YOUNG, JAMES M.*

* Removed from Territory.

PREFACE.

Mr. HEDGES has prepared for publication in this volume the cases which were decided by the supreme court at the August term, 1875, and those in which the opinions were delivered at the January term, 1876, by Messrs. Justices WADE and KNOWLES. The remainder of the reportorial work has been performed by Mr. Justice BLAKE.

The following cases, which are reported in the first volume of the Montana Reports, have been appealed to the supreme court of the United States and affirmed: *Atchison v. Peterson*, 20 Wall. 507; *Bullard v. Gillette*, id. 571; *Fisk v. Rodgers*, not reported; *Gallagher v. Basey*, 20 Wall. 670; *Griffith v. Hersfield*, 18 id. 657; *Griswold v. Boley*, 20 id. 486; *Lomme v. Sweeney*, 22 id. 208; *Mason v. Germaine*, 18 id. 659; *Toombs v. Hornbuckle*, id. 648. The case of *Kleinschmidt v. Dunphy*, which was reversed by the supreme court of the United States in 11 Wall. 610, was reconsidered in *Toombs v. Hornbuckle*, 18 id. 648.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

AT THE
AUGUST TERM, 1873, HELD IN VIRGINIA CITY

Present:
HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. FRANCIS G. SERVIS, }

PERKINS, appellant, v. GUY, respondent.

STATUTORY CONSTRUCTION — *legislative intent.* Courts ascertain the intention of legislatures in enacting a statute, by considering the object sought, and effect of their interpretation, and are not restricted to the words which are used.

GARNISHMENT — *effect of.* A garnishment makes the garnishee a trustee of the money due the defendant for the benefit of the plaintiff in the attachment suit.

STATUTORY CONSTRUCTION — “*all debts due*” — *judgment* — *note.* The one hundred and forty-first section of the Civil Practice Act, which provides that “all debts due such defendant” may be attached, does not include judgments and promissory notes not due.

INTERPLEADER — *no remedy in case stated.* R. recovered a judgment against P. for \$181, November 1, 1871. Certain creditors of R. sued him on the following day and served upon P. a writ of attachment, and notified P. not to pay the judgment to R. Afterward R. caused an execution to be issued and levied upon the property of P. to satisfy his judgment. The said credit

ors subsequently obtained judgments against R., and were seeking to enforce their attachments upon said judgment against P., when P. filed a bill of interpleader against R. and the creditors. *Held*, that the creditors of R. could not attach his judgment against P., and that P. could not maintain his action of interpleader.

Appeal from First District, Gallatin County.

THE demurrer to the complaint was sustained by MURPHY, J., on the ground that the same did not state facts sufficient to constitute a cause of action, and Perkins appealed. The sections of the Civil Practice Act, approved December 23, 1867, referred to in the opinion, are embodied in the Practice Act, approved January 12, 1872.

S WORD and J. J. DAVIS, for appellant.

Appellant had no remedy under laws of Territory, and this is a proper case for a bill of interpleader. 1 Bouv. L. Dict., "Interpleader;" 1 Danl. Ch. 64; *Richards v. Salter*, 6 Johns. Ch. 445; Story's Eq. Pl., § 297c; Story's Eq. Jur., § 806; *Angell v. Hadden*, 15 Ves. Jr. 244; *Langston v. Boylston*, 2 id. 109; *Bedell v. Hoffman*, 2 Paige's Ch. 199. Appellant can be compelled to pay a debt twice, if he cannot maintain this action. *Atkinson v. Manks*, 1 Cow. 691.

Appellant's offer to bring money into court is sufficient. It is not necessary to pay it into court. 2 Story's Eq. Jur., § 809; 2 Danl. Ch. 1670; *Mohawk & H. R. Co. v. Clute*, 4 Paige's Ch. 385.

Appellant paid all costs in suit against Robinson. He had no interest in money in his hands owing by him, and there was a doubt upon his mind as to the rights of the different claimants to the money. This is sufficient to sustain the bill. Story's Eq. Pl., § 297c; *Mohawk & H. R. Co. v. Clute*, 4 Paige's Ch. 385.

PAGE & COLEMAN, for respondents.

Each of the parties, asked to interplead, claim, by distinct legal titles, a sum in appellant's possession. The bill is defective. Robinson, the judgment creditor of appellant, is not made a party. Only the claimants to a portion of the judgment are made parties. The uncertainty with which the appellant is troubled, is ignorance of legal rights of claimants. "Every man is presumed

to know the law." The bill does not show that appellant was in danger of being forced to pay judgment more than once. A judgment cannot be reached by a garnishment of the judgment debtor. *Sharp v. Clark*, 2 Mass. 91; *Prescott v. Parker*, 4 id. 170; *Franklin v. Ward*, 3 Mason, 136; *Clodfelter v. Cox*, 1 Sneed, 330; *Trombly v. Clark*, 13 Vt. 118; *Clymer v. Willis*, 3 Cal. 363.

A judgment cannot be so subjected under an attachment from another court, especially an inferior one. *Drake on Attach.*, § 625, and cases cited.

The bill does not show any privity of contract or interest between appellant and judgment creditor and lien holders. Claimants assert distinct legal titles. *Story's Eq. Jur.*, § 820.

Appellant had a remedy at law. *Cod. Sts.*, § 598, p. 157.

KNOWLES, J. This is a bill of interpleader, brought by the plaintiff to compel the defendants to set up their rights, and have the same determined, to certain moneys in the possession of plaintiff.

The facts set up in the bill are substantially as follows: On the 1st day of November, 1871, W. D. Robinson recovered a judgment against the plaintiff in the district court of Gallatin county, for the sum of \$181.50, and costs of suit. On the 2d day of November of the same year, the defendants, Fridley, Hopping and McKenzie, each commenced suit against Robinson, and, as auxiliary thereto, had issued a writ of attachment, and a garnishee process was served upon the plaintiff, Perkins, on the 3d day of said month, warning him not to pay the said judgment to Robinson. These last suits were commenced in the probate court of the said county of Gallatin. On the last-named day, the defendant made answer to the said garnishee process, that he was indebted in the sum aforesaid upon the said judgment. On the 4th day of the said November, Robinson caused an execution to issue out of the office of the clerk of the district court for Gallatin county, upon said judgment. On the 13th day of said month, the sheriff of said county, the defendant Guy, by virtue of this execution, levied upon the property of the said Perkins, to satisfy the same. After the issuing of the said execu-

tion, the defendants, Page and Coleman, attorneys for the said Robinson, gave a written notice to Perkins that they had an attorney's lien upon said judgment, in favor of Robinson, to the amount of \$150; and forbade the plaintiff from paying that amount of said judgment to Robinson, or to the sheriff, Guy, or to Fridley, Hopping and McKenzie. Before the filing of this bill, the said attaching creditors had obtained judgment in the probate court against Robinson, in the suits aforesaid, and were seeking to enforce the same by virtue of the said garnishments against the plaintiff.

Under this state of facts was the plaintiff entitled to maintain this action? The court below held that he was not, and this ruling is assigned as error. Whether or not he could maintain this action depends upon whether the defendants, Fridley, Hopping and McKenzie, could garnishee the judgment Robinson had recovered against Perkins. If they could, then this action was properly brought; if not, then the ruling of the court below was correct, and the bill properly dismissed.

Section 124, page 157, of the Practice Act, which was in force at the date of the service of the aforesaid writ of attachment, provides that "The rights or shares which the defendant may have in the stock of any corporation or company, together with the interest and profits thereon, and all debts due such defendant," may be attached.

The fifth subdivision of section 125 of the same act, provides how debts may be attached. Section 127 of this act provides that from the date of the service of a copy of the writ, and notice provided for in the aforesaid fifth subdivision of section 125, upon the debtor of the defendant, unless he pay such debt to the sheriff, the said debtor shall be liable to the plaintiff for the amount of such debt until the attachment be discharged, or any judgment recovered by the plaintiff be satisfied. Section 130 of the said act provides that "Debts and credits attached may be collected by him (that is the sheriff), if the same can be done without suit. The sheriff's receipt shall be a sufficient discharge for the amount paid."

Section 208 of the Practice Act of 1867 is as follows:

"Satisfaction of a judgment may be entered in the clerk's

docket, upon an execution returned satisfied, or upon an acknowledgment of satisfaction, filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor, or within one year after the judgment by the attorney, unless a revocation of his authority be previously filed. Whenever judgment shall be satisfied in fact, otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgment; and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it."

Between this section and the clause quoted above from section 130, if a judgment can be attached there is presented a conflict, for this section provides how a judgment may be satisfied. But if the sheriff's receipt to a person, who has paid him a judgment debt, which has been attached, is a satisfaction of the same, then there is another manner of satisfying a judgment than that prescribed in section 208.

Again, let us examine this clause of section 130: "Debts and credits attached may be collected by him (that is the sheriff), if the same can be done without suit." Here is an intimation that the debts that may be attached may be collected by suit.

How is a judgment to be collected by suit? Again, section 127 provides that, after the service of the writ and notice, the person garnisheed shall be liable to the plaintiff for any debt he owes the defendant. How is the plaintiff to enforce this liability? He certainly cannot recover another judgment against the garnishee, for the demand is a judgment already. There is no provision of law for the plaintiff in the attachment suit, or the sheriff stepping into the shoes of the defendant in the attachment suit, and ordering execution to issue on a judgment in his favor. There is doubt enough thrown upon the intention of the legislative assembly in the language used by the different sections of the statute above referred to, to demand of a court a construction of the clause, "all debts due such defendant," and ascertain whether it embraces judgment debts. In construing a statute, the intention of the legislative assembly is the object sought. In arriving at this, a court is not confined to the exact words of a statute: "A thing which is within the letter of the statute is not within the

statute unless it be within the intention of its makers." *People v. Utica Ins. Co.*, 15 Johns. 358-380.

As it appears that our system of attachment laws in the United States sprang from what is known as the custom of London in attaching debts, under that custom a judgment debt could not be attached.

In construing a statute, the court may inquire what was the object the legislative assembly sought.

The process by which the debt of a debtor can be attached is usually called a garnishment. This term implies a warning to the person indebted to the defendant not to pay the money he is owing over to him. In New England this process is termed the trustee process. The garnishee process "is, in effect, a suit by the defendant, in the plaintiff's name, against the garnishee, without reference to the defendant's concurrence, and, indeed, in opposition to his will." Drake on Attachment, § 452.

It is very evident that the effect of a garnishment is to make the garnishee a trustee of the money due the defendant, for the benefit of the plaintiff in the attachment suit. This is the object the legislative assembly intended to effect. But how is a party to be made a trustee of funds over which he has no control? He owes the debt, but it is in the custody of the law. It is a judgment, and his property against his will may be taken upon execution to satisfy the same. It is not in his power to hold this money as a trustee.

It is a familiar legal maxim that "The law does not seek to compel a man to do that which he cannot possibly perform." The object of the legislative assembly to make the garnishee a trustee for the plaintiff in the attachment suit cannot then be effected, because it requires of the garnishee an impossibility. Neither can the remedy against the garnishee be in the nature of a suit. The debt is already a judgment, and two judgments cannot be entered for the same debt in different courts, when the court is apprised that the claim is already a judgment in the same jurisdiction.

It would not be uninteresting to learn how other courts have construed similar statutes. The courts of Connecticut, Pennsylvania, Delaware, Alabama and Mississippi, under, what I suppose,

similar statutes, have held that a judgment could be attached. In Connecticut, the court recognized the hardship that would be inflicted upon the garnishee from their ruling, and intimated that he might protect himself by an action in chancery similar to this. If a judgment debt can be garnished, the plaintiff in the attachment suit would not be a necessary party. His rights the garnishee knows. A court of chancery cannot change them. The only necessary parties would be the sheriff or clerk of the court, and the defendant in the attachment suit in such an action, enjoining these parties from collecting this judgment.

But, unless it could be shown that the garnishee was liable to suffer great and irreparable injury, this could not be done. If the defendant in the attachment suit was not insolvent, how could he do this? If the defendant in the attachment suit was solvent, we would witness, under our statute, the spectacle of a garnishee being compelled to pay a debt twice and have left an action against his original creditor to make himself whole. The effect of the construction of a law is a legitimate object for a court to consider. Surely, a court ought not to give a construction to a law that would have this effect, unless there is no legal way to escape it. A debtor ought to have some rights which a legislative assembly should respect. A construction of this law that would have this effect would not be consistent with any reasonable intention on the part of the legislative assembly. Again, the effect of holding that a judgment should be subject to attachment would present a conflict of jurisdiction, and allow one court to interfere with the judgments and process of another court.

In opposition to the decisions of the courts above referred to, we have the courts of New Hampshire, Massachusetts, New Jersey, Arkansas, Tennessee, the circuit court of the United States, and a decision of the supreme court of the United States, which, in principle, establishes this doctrine. This latter decision is the case of *Wallace v. McConnell*, 13 Pet. 136. This case decides that, after the commencement in the United States district court of a suit, a debt cannot be garnished. Certainly, if a debt, after the commencement of a suit, cannot be garnished, much less can a judgment. This decision is binding upon us. In every State in the Union, where the question has been presented, except in

Maryland, it has been held that a promissory note not due could not be attached by the garnishee process. Any other class of debts upon which an action may be brought, whether due or not, may be attached by this process. The only reason for exempting a promissory note not due is the peculiar class of the obligation. A debt evidenced by a promissory note not due is as much under the control of the payee thereof as a judgment debt is under the control of the person liable thereon. "All debts" embraces debts evidenced by a promissory note, whether due or not, as well as judgments. If courts are at liberty to so construe this statute as to exempt a debt evidenced by a promissory note from the operation of the statute, a court ought to be at liberty to say that it did not embrace judgments; that the only debts that were included within the operation of that statute would be all those debts upon which the money payable thereon could be held by the garnishee, as a trustee of the plaintiff in the attachment suit, and over which he had control.

For these reasons we think the court below committed no error.

The judgment of the court below is, therefore, affirmed, with costs.

Judgment affirmed.

EDWARDS, respondent, v. TRACY, appellant.

PRACTICE — *settlement of statement by successor of judge.* The Civil Practice Act, which provides that the judge or court shall settle the statement on appeal, authorizes the successor of the judge who tried the cause to settle the statement.

SAME — *notice of amendment to statement.* A party who fails to file amendments to a statement on appeal, after he has been notified that the same has been filed, is not entitled to notice of the time when the same will be presented to the court for settlement.

SAME — *statement settled in vacation.* The statement on appeal can be settled in vacation by the judge who tried the cause.

Appeal from First District, Gallatin County.

THE respondent filed a motion to strike from the transcript the statement of the evidence. This action was tried in March, 1872,

by MURPHY, J., without a jury, and the statement on this appeal was settled by SERVIS, J. (who was the successor of MURPHY, J.), at a subsequent term. The statute, which is referred to in the opinion, contains the following provisions:

The appellant, who prepares a statement of the case, must "file the same with the clerk of the court, and give notice to the opposite party, or his attorney, of such filing. The respondent may, within five days thereafter, prepare amendments to such statement, and file the same, and serve notice thereof on the opposite party. The statement and amendments which may be filed shall be presented to the judge or court, upon notice of two days to the opposite party, and a true statement shall thereupon be settled by the judge or court. If no amendments are filed, the statement may be presented to the judge or court without any notice to the respondent." Civ. Pr. Act, § 371. When a party omits to propose amendments, he shall be deemed to have agreed to the statement as prepared; "but the judge who heard the cause shall, notwithstanding such * * * implied agreement, have power to correct any misstatement of facts, or of his rulings, which such statement may contain." Civ. Pr. Act, § 372. "The judge before whom the cause was tried" may enlarge the periods of time above limited. Civ. Pr. Act, § 373. "The statement, when settled by the judge, shall be signed by him, with his certificate that the same has been allowed, and is correct; when the statement is agreed upon by the parties, they, or their attorneys, shall sign the same, with their certificate that it has been agreed upon by them, and is correct." Civ. Pr. Act, § 374.

S. WORD and PAGE & COLEMAN, for the motion.

J. J. DAVIS and H. N. BLAKE, contra.

WADE, C. J. This is a motion by the respondent, wherein he seeks to have stricken from the transcript all that portion thereof which purports to be a statement of the evidence adduced upon the trial for the following reasons:

First. That it does not appear that notice of the filing of the statement was given to the opposite party or his attorney.

Second. That it does not appear that the opposite party had any notice of its presentation to the judge for settlement; and

Third. That it does not appear that the statement was agreed to by the parties, or settled by the judge as required by law.

This cause was tried in the court below at the March term thereof, 1872, and the statement was settled during the March term, 1873, of said court, but, in the meantime, the judge who tried the cause had vacated his office and his successor had been appointed, and the successor settled and signed the statement on appeal.

It is claimed, on behalf of respondent, that, because the judge who tried the cause did not settle the statement, and that it was settled by his successor in office, therefore the statute which provides that the statement and amendments shall be presented to the judge or court, upon notice to the adverse party, and shall be settled by such judge or court, has been violated.

If it were the law that only the person acting as judge, who heard or tried the cause, could settle the statement therein, then the administration of justice would be subject to many accidents, for the death, removal from office, or other disability of the judge who tried the cause, would forever deny to the party his right of appeal; so that if a judge departs this life, or if his official life is ended by a political change in the government, or if a judge should be removed for the reason that he was corrupt in his office, or was incompetent to discharge the duties thereof by reason of mental imbecility, or want of education, or knowledge of his profession,—yet at the time such judge so vacates his office, or is removed therefrom, all causes pending in his district on statement for appeal, must fail, if this statute can be construed as contended for by the respondent.

Our view of the statute is this, that, by the use of the word “judge” instead of “court,” it authorized a judge in vacation to settle a statement, and we hold that, however many changes there may be as to the individual who holds the office of judge, yet there is no change in the office, and no vacation therein. The office is continuous, and the officer, for all legal purposes, is always the same.

The judge’s commission may expire, but if it does he holds

over under the Organic Act until his successor is duly appointed and qualified, so that the office and officer continue, although the individual who occupies the position may change. It, therefore, follows that whatever act might be legally done and performed by the judge who tried the cause, may also be done by his successor in office, for, to all legal intents and purposes, they are one and the same individual.

It is objected that no copy of the statement was served upon the adverse party, and that such party had no notice of the application to the judge or the court for a settlement of the statement.

The transcript discloses that, immediately after the assignment of errors, and on the same paper, there is the following, "Received a copy of this paper," which receipt is signed by the attorney for respondent, and properly dated. The paper upon which this receipt is signed has no title, no caption or heading or beginning, except it be the title and caption at the commencement of the statement, where the names of the parties and the court are given, and we think it reasonable to presume that a copy of the statement was attached to this paper when it was receipted for by respondent. This must have been the case in order to have given the paper any significance whatever.

If this supposition is correct, then no notice was necessary when the statement was presented to the judge for settlement, for the reason that no amendments to the statement had been filed by the adverse party, and when this occurs, no notice is necessary by the terms of the statute.

This statement was presented for settlement in open court, and there being no amendments filed to the statement, and the adverse party having notice that the statement was filed, and having failed to file any amendments, then no notice to such party was necessary when the statement was presented for settlement; and no notice being necessary, the fact that the record fails to show that such party was present before the judge is not material.

The motion is overruled.

Motion overruled

WILLIAMS, appellant, v. JEFFERSON COUNTY, respondent.

STATUTORY CONSTRUCTION — repeal by implication. The act of the legislative assembly, approved January 10, 1865, which fixed the fees to be paid to district attorneys, was repealed by implication by the act, approved February 9, 1865, which established different fees for the same services.

SAME — fee of district attorney. The act, approved February 9, 1865, allowed the district attorney a fee "for drawing each indictment * * * provided that no fee shall be allowed for drawing any indictment that may be quashed." *Held*, that district attorneys are not entitled to fees for drawing indictments, which have been quashed for any cause. *Held*, also, that district attorneys are entitled to the fee for drawing an indictment, which has been returned by the grand jury and duly indorsed, "not a true bill."

SAME — docket fee of district attorney. The act, approved February 9, 1865, allowed the district attorney fees for "convictions of misdemeanors," "convictions for felony," "convictions in capital cases," and "docket fees in all cases not above specified, where county attorney is required to prosecute or defend in district courts." *Held*, that district attorneys are not entitled to docket fees in criminal cases.

Appeal from First District, Jefferson County.

THE judgment was rendered by SERVIS, J.

E. W. TOOLE and W. F. SANDERS, for appellant.

Appellant is entitled to fees for drawing indictments, which were dismissed by the court on account of facts and the trial thereof, and not for any defect in the indictments. No statutory grounds existed for quashing the indictments, nor were they, in fact, quashed. The statute intends that district attorneys shall be entitled to fees for drawing indictments which are not quashed through any fault of the party drawing them. The district attorney is required to present every case in which an indictment is found. It goes upon the docket, and the law gives him a docket fee therefor. If an indictment is drawn by district attorney in cases presented to grand jury, he is entitled to the fee, if the foreman certifies thereto. Acts, 1865, 476; 352, § 3; Crim. Pr. Act, 1865, §§ 72, 88, 136, 183.

G. G. SYMES and PAGE & COLEMAN, for respondent.

Appellant is entitled to no fees for drawing indictments which

are quashed. The statute makes no exception. The district attorney should see that a lawful grand jury is drawn. Cod. Sts., 379, § 4.

The docket fee refers to cases which are tried, and not to those which are merely written on the calendar for the purpose of quashing indictments. There is a difference between a docket fee and a calendar fee. Bouv. L. D. 441; Civ. Pr. Act, § 192; Webster's Dict., "Calendar" and "Docket;" Bright. Dig. 273.

The county commissioners examined the appellant's bill, and exercise judicial power in passing thereon. An appeal is allowed therefrom, and the certificate of the presiding judge and district attorney cannot control that discretion. Crim. Pr. Act, 410; *People v. Supervisors N. Y.*, 1 Hill, 364; *People v. Supervisors Fulton*, 14 Barb. 52.

SERVIS, J. This is a proceeding instituted by the appellant, the district attorney of Jefferson county, to obtain compensation under the statute for services performed by him at the term of the district court held in that county in May, 1872. The appellant's itemized account amounts to \$1,280, and was duly presented to the board of county commissioners of the county, for allowance and payment, and rejected, and payment refused. An appeal was taken by the district attorney to the district court, and said account was disallowed, and judgment was entered in favor of the commissioners. From this action, the district attorney appealed to this court.

From an inspection of this account, it appears that the appellant claimed \$180 for "docket fees" of cases remaining upon the court calendar at the time he succeeded to his office; that \$260 were for drawing indictments that were afterward quashed, and never brought to trial; that \$520 were for docket fees arising from the placing upon the court calendar of the indictments so quashed; and that the remainder of the \$1,280, to wit, \$270, was for services for drawing indictments that were returned by the grand jury, indorsed "not a true bill."

By referring to the laws of the Territory, we find that, in 1865, an act was passed, creating the office of district attorney, and prescribing the duties, and fixing the salary to be paid by the Terri-

tory, and certain fees to be paid by the county. Another act was passed subsequently at the same session of the legislature, relating to the fees of officers in general, whereby the former law, fixing the fees of the district attorney, other than his salary, was repealed by implication. A new fee bill for this officer was enacted, providing, that for drawing indictments he shall be entitled from the county to a fee of \$10 in each case, "provided, that no fee shall be allowed for drawing any indictment that may be quashed." It also provided the following fees for said attorney: "Docket fees in all cases not above specified, where county attorney is required to prosecute or defend in district courts, \$20." Sts. 1865, 352, 476.

These enactments provided specifically for the fees for district attorneys in various criminal matters, among which are those for drawing indictments, convictions for felony, misdemeanors, etc. Then follows the above clause relating to docket fees.

It then follows that, in the cases specified in the act, no docket fees shall be allowed. What are the cases for which docket fees are claimed by appellant? They are indictment cases, criminal cases, for which the legislature has said in plain terms, no docket fee shall be allowed. What was the object of the legislature in making provision for docket fees? The answer might be, that many other duties are by law enjoined upon the district attorney, whereby he is required to prosecute and defend for the people, and is well entitled to such a fee. But, in this case, no such fee can be allowed, and the judgment of the court below, relating to the docket fees, was correct.

It is claimed by the appellant that, although he has charged fees for drawing indictments which were quashed by the court, they were quashed without any fault on his part. It appears that he exercised due caution, care and diligence in the performance of his duty, and made due inquiries as to the qualifications of the grand jurors, by whom said indictments were found. After the indictments were found, it turned out that one of the grand jurors had not taken out his final papers of naturalization, and was thereby disqualified to serve as such, and for this reason the indictments were quashed.

Upon this subject, we think the statute is explicit, and unquali-

fied, and admits of no doubt; and that, in no case where an indictment is quashed by the court, no matter for what cause, the district attorney is not entitled to a fee for drawing such indictment. The legislature has said that in no case, where an indictment is quashed, shall there be any fee allowed for drawing the same.

The appellant claims \$270 for drawing indictments, which were returned and indorsed by the grand jury, "not a true bill." We are of the opinion that the drawing of these indictments was a duty then by law required of the district attorney, and for which he was and is now entitled to the fee then prescribed by law therefor, amounting to \$270. The board of county commissioners and the court below erred in refusing to allow the same. The judgment is hereby modified accordingly, and the cause is remanded to carry the same into execution.

Judgment modified.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1874, HELD IN VIRGINIA CITY.

Present :

HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. FRANCIS G. SERVIS, }

DRIGGS, respondent, v. HARRINGTON, appellant.

STATUTORY CONSTRUCTION — *demand by officer for redelivery of attached property.* The amendment to the one hundred and thirty-seventh section of the Civil Practice Act, approved January 15, 1869, prescribes the following conditions of an undertaking for the release of attached property by the officer, which "the sheriff shall require:" "That, in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment." *Held*, that the officer, to whom the undertaking is given, is the proper person to make the demand for the redelivery of the property.

ATTACHMENT UNDERTAKING — *liability of sureties useless demand.* The sureties upon an undertaking, which has been executed to the sheriff in pursuance of the said amendment, are not released from their liability by the failure of the officer, or any party, to make a demand upon the defendants in the attachment suit for the redelivery of the property, if the acts of said defendants have rendered useless such a demand.

SAME—*case stated when demand is excused.* In an action brought against the sureties upon a statutory undertaking for the redelivery of attached property, no demand is required for the redelivery of the property, which has been released, when the property has been removed from the Territory by the defendant in the attachment suit, and said defendant is insolvent and has left the Territory, and has no place of residence or business therein, and the sureties have been notified that the judgment, which was obtained in the attachment suit, remains unpaid.

Appeal from First District, Madison County.

WILLIAMS sued Stevens and Trivett, December 12, 1870, to recover wages for services rendered. A writ of attachment was issued and the sheriff levied upon some gold retort as the property of Stevens and Trivett. Stevens applied to the sheriff for the release of the property May 9, 1871, and presented an undertaking that was signed by Stevens, as principal, and the appellants, as sureties. The officer approved the undertaking and delivered the retort to Stevens. Williams recovered a judgment against Stevens and Trivett, and assigned the same to the respondent, after the property had been released. The respondent commenced this action upon the undertaking against the sureties, who demurred to the complaint. **SERVIS, J.**, overruled the demurrer and rendered judgment against the sureties.

S. WORD, for appellants.

The liability of appellants must be fixed before they can be sued in this action. A demand should have been made upon Stevens for the redelivery of the property before respondent commenced this suit. *People v. Buster*, 11 Cal. 215; *Kinkead v. Shreve*, 17 id. 275. The suit is not such a demand. The demand is a condition precedent to the liability of the appellants, who were sureties.

The sureties stand upon the terms of their written undertaking. The court cannot make appellants liable, if their contract does not do so. There are no equities against sureties. *Bank of Steubenville v. Admr. Carroll*, 5 Ohio, 207; *State v. Crooks*, 7 id. 573; *McGowney v. State*, 20 id. 97; *Hall v. Williamson, Admr.*, 9 Ohio St. 17; *Miller v. Stewart*, 9 Wheat. 702; *U. S. v. Boyd*, 15 Pet. 208; *Evans v. Bradley*, 17 Wend. 422.

There is no ambiguity in the contract. The law means what it says. The court cannot go outside of the language of the law for an interpretation that will charge the appellants.

Stevens remained in the Territory six months after the judgment was rendered for Williams, during which time a regular term of the district court intervened. No demand was ever made. The demand should have been made as soon as the judgment was entered. The complaint fails to show that a demand could not have been made before suit. The allegation of insolvency does not excuse the demand.

Appellants never waived their rights to have this demand made. The facts alleged in the complaint cannot affect the rights of sureties.

J. E. CALLAWAY and H. N. BLAKE, for respondent.

The facts set forth in the complaint make the demand immaterial. If these facts do not excuse the demand, the statute gives debtors the means of escaping from their creditors, and leaves creditors without a remedy. The law must receive a reasonable construction.

The sheriff is the "proper officer" to make the demand. He cannot act outside of Madison county. Respondent demanded of appellants payment of the judgment before commencing this suit. This was a sufficient notification that Stevens had not redelivered the property.

Appellants must look to officer, if they have been injured by his failure to make the demand. Drake on Attach., § 314; *Cook v. Boyd*, 16 B. Monr. 556.

In Massachusetts a demand is not necessary if the holder of the property is not in the State. *Mason v. Briggs*, 16 Mass. 453.

The commencement of the suit is a sufficient demand. *Halleck v. Moss*, 22 Cal. 266. Demand need not be made, if rendered nugatory by Stevens in leaving the Territory. *Webster v. Coffin*, 14 Mass. 196; *Gray v. Dougherty*, 25 Cal. 280.

Appellants knew all the facts, and that they must pay the judgment if the property was not returned. *Garretson v. Reeder*, 23 Iowa, 24. The substantial rights of appellants are not affected. Stevens cannot deliver the property if demanded.

Under similar statutes appellants have been held liable, although no demand had been made, and some requirement of the statute had not been complied with. *Weed v. Dills*, 34 Mo. 483; *Webster v. Coffin*, 14 Mass. 196; *Garretson v. Reeder*, 23 Iowa, 21; *McMillan v. Dana*, 18 Cal. 339.

WADE, C. J. This is an action brought against the sureties upon a statutory undertaking given to release attached property in pursuance of section 2 of an act (Laws of 1869, p. 67), which provides, "Before releasing such attached property as aforesaid to the defendant, the sheriff shall require an undertaking, executed by the defendant and at least two sureties, residents and freeholders, or householders, in the county, to the effect that, in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that, in default thereof, the defendant and sureties will pay to the plaintiff the full value of the property so released."

The plaintiff in the attachment case recovered a judgment, and this suit is brought by the assignor of such plaintiff, but no demand was made by the plaintiff, or by the proper officer, upon the defendants in the attachment suit to redeliver the released property before the commencement of this action, and this failure to make demand, it is contended, releases the sureties, these defendants, from the obligations of their undertaking.

It is averred in the complaint, and admitted by the defendants, that the property attached was gold retort, and that immediately after it was released, by giving the undertaking sued on, it was taken out of the Territory and placed beyond the jurisdiction of the court; that before this action was brought, the defendants in the attachment suit had left the Territory, and had no place of residence or business place therein; that they were insolvent, and that these defendants were notified that said judgment had not been paid.

Under this state of facts no demand was necessary. The demand contemplated by the statute for the redelivery of the property should have been made by the sheriff or other proper officer. The sheriff receives the undertaking, and he should de-

mand the redelivery of the property. But the sheriff can make no demand out of his county, and especially not out of the Territory, and as the property and the principals for whose benefit this undertaking was given were not in the Territory at the time this action was brought, and had no residence or place of business therein, no demand upon them could have been made by the sheriff. But if they had been in the Territory, and within the jurisdiction of the officer, and he had failed in his duty to make demand to the damage or injury of the sureties, they would have their remedy against such officer, but their liability upon the undertaking would not be released. The sureties were notified that the judgment was not paid. In that event, they had promised that the property should be redelivered, and it was for them to cause the officer to make demand for such redelivery. But the demand could not be made because the principals had left the Territory, and had taken with them the attached property by the action of these defendants in executing this undertaking.

The law does not require a vain, nugatory or impossible act, and to hold that a demand was necessary in order to fix the liability of sureties upon an undertaking, under such circumstances as these, would entirely destroy the security of such undertaking, for it would enable the defendant in every attachment case to obtain possession of the attached property by virtue of the undertaking, and would also enable him to make such undertaking void and good for nothing, by simply keeping out of the way of a demand.

Sureties, although they have the right to stand upon the letter of their contract, cannot make such contract the instrument for perpetrating fraud, in order to be released from its obligations.

No man shall take advantage of his own wrong, and to release these sureties would enable them to do this, if they felt so disposed, for if a personal demand is in all cases necessary, there is nothing to prevent sureties from conniving with their principals to the end that they and their property are placed beyond the reach of the plaintiff, and then, because no demand can be made, the sureties are released, when, in truth, the sureties may have been the means of rendering a demand impossible.

The judgment is affirmed.

Judgment affirmed.

SANDS, respondent, *v.* MACLAY, appellant.

STATUTORY CONSTRUCTION — *denials in answer.* The fifty-sixth section of the Civil Practice Act, approved January 12, 1872, provides that "the answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." *Held*, that this section does not embrace denials made upon information and belief.

SAME — *affidavit of verification* — *denials.* The sixty-third section of the said act, which requires that "the affidavit of verification shall state, that the facts stated * * * are true * * * except as to those matters which are therein stated on" the "information and belief" of the affiant, does not modify said fifty-sixth section and authorize parties to make denials upon information and belief.

PRACTICE — *judgment on pleadings for insufficient denials.* The denials of an answer, which do not conform to the Civil Practice Act, raise no issue and thereby admit the facts stated in the complaint; and judgment may be entered thereon without striking out the answer.

STATUTORY CONSTRUCTION — *hardship.* Courts will not consider the hardship which may result from their interpretation of a statute.

PLEADING — *knowledge of party.* The court below must determine generally questions relating to the presumptive knowledge of facts by the party who states them in his pleadings.

CASE AFFIRMED. The case of *Lomme v. Kintzing*, 1 Mon. 290, holding that a party may move for judgment when the answer raises no material issue, affirmed.

Appeal from Third District, Lewis and Clarke County.

THE complaint of Sands alleged that Maclay *et al.* were common carriers and received goods at Corinne, which were to be carried to Helena and delivered to Sands; that the goods were lost through the negligence of Maclay *et al.*, and demanded damages.

The answer was as follows: "The defendants, * * * upon their information and belief, deny that in or about the goods in said complaint mentioned, or any thereof, these defendants were common carriers, or jointly or otherwise interested in carrying the same. And upon their said information and belief, the said defendants do deny that on * * * the plaintiffs caused to be delivered to these defendants in their said capacity of common carriers, or that these defendants, in their said capacity of common

or other carriers, received the goods in said complaint mentioned, or any thereof, and deny that they, or any of them, negligently conducted or misbehaved in regard to the said goods, or any thereof, in their said calling as carriers or otherwise. And the said defendants do, upon their information and belief, further deny that said goods, or any thereof, were delivered by plaintiffs to these defendants, or received by these defendants, or any of them, from plaintiffs to be by the said defendants carried to Helena or elsewhere, and there or elsewhere delivered to the plaintiffs for a reasonable reward to be paid them therefor or otherwise. And upon their said information and belief, the said defendants deny that by reason of any neglect, or misbehavior with reference to said goods, the same, or any thereof, were lost to plaintiffs. And the said defendants have not and cannot obtain sufficient information upon which to base a belief as to whether said goods, or any thereof, are or were lost to the plaintiffs, and they do therefore deny the same. And the said defendants do further deny, upon their information and belief, that, by reason of any thing in the plaintiffs' said complaint contained, said plaintiffs have been damaged in any sum of money whatever."

In the affidavit of verification to the answer, Maclay deposes: "Affiant further says that the defendants' said business at Corinne, Utah, was performed by agents, from whom affiant's information, on which he bases said belief, is derived. Affiant further saith that no one of the defendants, now within this county, is acquainted with the facts in said answer set forth."

Sands filed a motion that the court enter judgment in the action upon the grounds that the answer was sham and irrelevant, and raised no issue. The court, WADE, J., sustained the motion.

W. F. SANDERS and E. W. TOOLE, for appellants.

Negligence is the gravamen of respondent's cause of action. *Gay v. Winter*, 34 Cal. 153. Appellants deny this upon information and belief and were entitled to a trial on this issue.

No verification was necessary at common law. What the legislative power has prescribed as to the form of the verification is sufficient, and courts cannot legislate thereon. *Jones v. Peta-*

luma, 36 Cal. 234; *Vassault v. Austin*, 32 id. 597; *Roussin v. Stewart*, 33 id. 208. The verification of the answer is sufficient under the statute. Civ. Pr. Act, §§ 56, 63.

A "specific" denial refers to the thing denied and not the vehemence of the denial. *Gas Co. v. San Francisco*, 9 Cal. 473.

Vaunts of knowledge or apologies for ignorance are out of place in a pleading. "Many words, they darken speech." "Presumptively" is used in section 56 to denote a probability amounting to an almost absolute necessity. It is unreasonable to hold that appellant had a personal knowledge of the goods received by him.

A denial on information and belief is good under the statute. The verification states the fact. The purpose of a verification is to secure good faith. The law says you may deny as of absolute knowledge, but it shall be sufficient if you deny on belief, based on information. The rules of chancery pleading are not applicable. Civ. Pr. Act, §§ 47, 56; Broom's Max. 481.

CHUMASERO & CHADWICK, for respondent.

The answer does not come within the statute, and is insufficient. The denials are sham, as appellant must have known the facts stated in the complaint, or had notice thereof. *Edwards v. Lent*, 8 How. Pr. 28; *Kellogg v. Barker*, 15 Abb. 287; *Fales v. Hicks*, 12 How. Pr. 153; *Humphreys v. McCall*, 9 Cal. 59; *Brown v. Scott*, 25 id. 194, and cases cited.

The New York Code, under which most of these decisions were made, is nearly like that of Montana. § 149, N. Y. Code.

The denials in the answer are of facts, which appellant knew, or is presumed to know. He admits that he received the goods, and is chargeable with notice of the conditions upon which they were received. Each member of a firm is chargeable with the knowledge of the business transacted by one of the firm, or an authorized agent, and cannot plead ignorance in an answer.

The denials are not aided by the verification. The statute was amended to require specific instead of general denials. Sham modes of pleading were abolished.

The liability of appellant as common carrier cannot be questioned. It is not sufficient to deny negligence, and appellant

must show that goods were lost by the act of God, or public enemy, and how.

KNOWLES, J. The most important question presented in this action is the right of a defendant to deny the allegations of the complaint upon information and belief.

The Practice Act of this Territory, approved December 23, 1867, in section 46, provided that the answer of the defendant should contain: "First, if the complaint be verified, a specific denial to each allegation to the complaint controverted by the defendant, or a denial thereof, according to his information and belief." Under this provision of the statute, undoubtedly, the defendant could deny upon information and belief. This section of the Code, however, was amended in 1872, and it was provided that "the answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant."

Another mode of presenting an issue was also provided for, that was not in the former Practice Act, namely: "In denying any allegation in the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state that, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base a belief." Civ. Pr. Act, § 56.

In this amended Code, it will be observed that the clause allowing a denial upon information and belief was left out. We must presume that this was done intentionally. Can the term, "specific denial," be made to signify both a positive or absolute denial, and a denial upon information and belief?

It is certain that the legislative assembly of 1867 did not consider that it could. If they had so understood that term, it is not reasonable to suppose that they would have provided for both a specific denial and a denial upon information and belief.

If they had held that the term "specific denial" embraced both an absolute denial and a denial upon information and belief, then the clause they put into the statute, "a denial according to information and belief," was useless, mere verbiage. The more reasonable view is, that they used the term "specific denial" as

contradistinguished from a general denial, and a denial upon information and belief. Considering this the proper construction, and the conclusion is inevitable that, by leaving out the clause "a denial according to information and belief," the legislative assembly of 1872 intended to abolish that mode of denial. However, if other courts had not come to the conclusion that a statute, amended as ours has been, excluded a denial upon information and belief, I should hesitate long before coming to such a determination. In 1851, the New York Code had a provision in relation to denials in an answer similar to our Practice Act of 1867. That provided that a defendant might make a general or specific denial of each material allegation of the complaint controverted by defendant or a denial according to knowledge, information or belief.

In 1852, the New York legislature amended this statute so that it read as follows :

"A general or specific denial of each material allegation of the complaint controverted by the defendant."

It will be seen that this amendment left out the clause "a denial according to knowledge, information, or belief."

In the case of *Thorn v. N. Y. C. Mills*, 10 How. Pr. 19, Mr. Justice BACON says, upon this subject : "I regard the construction put upon this section (149) by Judge DALY, in *Hackett v. Prichard*, 11 Leg. Obs. 315, as the true exposition of the clause in question. The clause allowing a denial according to a defendant's knowledge, information or belief, has been stricken out, and I suppose the construction of the amended section now is, that the defendant must deny absolutely, without any qualification whatever, unless he can deny that he has either knowledge or information sufficient to form a belief. Where he cannot do this, as where he has knowledge or information, and has formed a belief, he must deny positively, for he cannot traverse the allegation now, except in one of two modes. The intention of the legislature appears to have been to allow the defendant *less latitude* in traversing the complaint than before, for they have designedly omitted the provision allowing a denial upon knowledge, information or belief."

In the case of *Blake v. Eldred*, 18 How. Pr. 240, Mr. Justice

JAMES uses this language: "But I am inclined to think this second denial a sham. It answers on information and belief, and then denies all the allegations in the complaint 'inconsistent with the facts' alleged and stated in the answer. Code, § 149, requires the defendant to deny the material allegations of the complaint absolutely, or of any knowledge or information sufficient to form a belief. Answering on information and belief is not denying on information and belief; and if it were, it would not aid the pleading, because such a denial is not authorized by the Code."

To the same point, see *Hackett v. Richards*, 3 E. D. Smith, 13; *Therasson v. McSpeddon*, 2 Hilt. 1; 2 Whittaker's Pr. 80.

The case of *Edwards v. Lent*, 8 How. Pr. 28, is an authority apparently in conflict with those above. On an examination of the date of the rendition of the opinion, I am inclined to think it must have been given before the amendment to the New York Code in 1852. The opinion was delivered in 1852, the same year of the amendment, and no reference is made to it.

The fact that the verification prescribed in the Code provides that the affidavit shall state "that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true," is urged by the appellants with considerable force, they claiming that it was contemplated, from the verification prescribed, that every pleading in a case might have allegations upon information and belief. The answer to this is, that the verification prescribed by the New York Code contains this provision, and yet the courts in that State have rendered the decisions above referred to. The courts of that State did not consider the provisions in the section upon verification sufficient to override the positive requirements of the form of a denial prescribed by section 149 of their Code, and I do not think it sufficient to override the requirements of our Code.

It is probable that the construction I have given to section 56 of our Practice Act works a considerable hardship upon the defendants in this case, and may work a hardship in many other cases unless the section should be amended by our legislative assembly.

I must, however, construe the law as I find it and in accordance with what I conceive legal principles. The hardship of such a law is a consideration for the legislative assembly and not the courts.

There is one other denial of the defendants to be considered, namely: "And the said defendants have not, and cannot obtain sufficient information upon which to base a belief, as to whether said goods, or any thereof, are or were lost to the plaintiffs, and therefore deny the same."

Taking all of the facts into consideration, presented in the record, and the court may have well considered this denial as sham. The plaintiffs allege that the goods were delivered to the defendants as common carriers. The defendants should know whether or not they delivered said goods to the plaintiff. The only thing that is set forth, that would in any way excuse them from not having this knowledge, is the statement in the verification that the business was transacted by agents. Still the court below may have held that they ought to know enough of the conduct of their agents to have some belief or information as to their doings, and that parties could not shut their ears and refuse to receive information upon a subject of such interest to them and the person who intrusted them with his property. The question of whether a party has presumptive knowledge of a fact stated in his pleadings, must, in some measure, be left to the judgment of the court below. Considering that I have held that the other allegations of the complaint were not properly put in issue, I cannot see any error in the court below in holding that if all the other allegations of the complaint were admitted, the defendants must have presumptively had knowledge as to whether the plaintiff had lost any of the goods specified.

It is contended that, if all of these denials were sham, still the plaintiff had no right to judgment without first striking out the answer. In effect, that is the plaintiff's motion. The first ground for the motion is, "that the amended answer filed herein is sham and irrelevant." In New York, the practice of moving for a judgment on a sham or immaterial answer has been sustained, and this court has held that a party might move to strike out an answer that raised no issue, and then for judgment, or for

judgment notwithstanding the answer, on the ground that it raised no material issue. *Lomme v. Kintzing*, 1 Mon. 295. The courts of California have held that where an answer raised no material issue, it would be considered that the complaint was admitted. A defendant cannot present an issue in any other manner than prescribed by the Code. Hence a denial in an answer that does not conform to the requirements of the Code raises no issue.

Suppose that the form of raising an issue prescribed in the Code of alleging that the defendant has not and cannot obtain information sufficient to form a belief was stricken out, could it be contended that an issue could still be presented in that manner? I think not. The point that the record does not show that the court below took proof upon the amount for which he rendered judgment, is now for the first time raised by the dissenting opinion herein. All presumptions are in favor of the proceedings of the court below, and this court will not consider errors of this character, concerning which the defendants took no exceptions in the court below, and for which no error is assigned in the record presented to this court, or pointed out in the briefs and arguments of counsel.

For these reasons, the judgment of the court below is affirmed, with costs.

Judgment affirmed.

SERVIS, J., dissenting. I cannot concur in the opinion just announced. My reasons therefor are that, in my judgment, it misconceives the true office of an answer under our Code. It applies rules and principles which had their origin under other Codes, entirely dissimilar from ours, and which have been so often altered, amended and repealed as to be of little authority and less aid in the construction of our statute, now under consideration. And it also misconceives the authority of the court to render judgment as by default, pending an answer duly on file, and undisposed of by motion or demurrer.

It is undoubtedly true that the strictness of common-law rules of pleading would condemn the answer in question upon demurrer. But our Code, like all others, has abolished the formal rules of pleadings, and established in their stead others essen-

tially different. It has defined our pleadings to be the *former* allegations of the parties, and it has defined the *rule* by which their sufficiency is determined, which is that of their liberal construction, with a view to substantial justice, and this should be the Polar star, strictly observed, in construing all Codes of civil practice.

It is said that section 56, under which this answer is drawn, does not *expressly* provide that it shall or may be drawn upon information and belief. While this is true, it is also true that it does not, expressly or by implication, prohibit an answer being so drawn; and when we turn to section 63 we find a very strong implication in favor of such an answer; in fact, the form therein provided for an affidavit of verification to an answer, expressly provides, "That when the matters are stated in an answer upon information and belief," that then the affidavit shall *so state*. But it is said that this applies solely to that second mode provided for in section 56, whereby (not to deny, but) to form an *issue*, viz.: "That, in denying any allegation in the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue, for the defendant to state that he has not, and cannot obtain sufficient knowledge or information upon which to base a belief."

I maintain that this does not annihilate that strong presumption favoring a denial upon information, as derived from section 63 of our Code. In fact, the very provision there made for the verification of an answer is utterly inapplicable to an answer, other than one of personal knowledge *or* of information. Would it not be quite inconsistent for a defendant to say by his answer that he has no information and no belief as to the subject-matter of a complaint, and then add thereto an affidavit, swearing that he believes the same to be true; that is, that he believes to be true that of which he has no knowledge, no information, no belief, and no means of obtaining the same?

Counsel are mistaken in the correct rendition of our statute, when they say, in their brief, that, "In denying an allegation not presumptively within the knowledge of the defendant, *he may deny*, on information and belief, if he has not, and cannot obtain sufficient information upon which to base a belief." Our statute

does not so read. It provides that, in such case, such statement shall be sufficient to put the allegations of the complaint *in issue*; not that such statement shall so change the English language as to state a denial without denying any thing. It simply means that such statement shall operate and have the same effect in forming an issue as an absolute denial would have. But it is said that even then this mode will not avail the defendant of a defense, because it is charged against him by *motion*, that the matters alleged against him are *presumptively* within his knowledge, although he *swears* to the contrary. This, however, can only apply to *one* of the denials in the answer, which does not affect the error of which I complain. And I care not further to discuss this branch of the case, other than to remark that, if ever a defendant should be in so unfortunate a condition as to have *no belief* or *unbelief* about the subject-matter of his lawsuit, then his *presumptive knowledge* might possibly be tested, tried and determined by the court, referee or jury.

It is insisted that a proper construction of the language used in the answer under consideration, makes the pleader attempt to set up the *facts of his information* and belief as a *defense* to the action. This, I think, is straining construction beyond liberality; for it seems to me quite apparent, and that, too, without much liberality, that it is not his *belief*, but the *facts believed to exist*, upon which he relies for his defense.

And it is further urged that the defendant has not *specifically* denied the allegations he seeks to controvert; not that he has not specifically pointed out and stated *wherein* and *what* he controverts, but that he has so done upon information and belief, and, therefore, it is not a specific denial.

I maintain, that all that is required under our Code, in order to specifically controvert the allegations of a complaint, is for the answer to point out, state and define, wherein he so controverts the same, and then on oath aver his *belief* in the truth thereof; and that is all that is meant by the phrase, *specifically deny*. And this the defendant has done. He has stated what he denies, *how*, and the *means* that enabled him so to deny, and swears he believes it all to be true. How else, I ask, do men usually obtain their general knowledge but upon information. When are they

at liberty to impart that information? And the answer is, when they *honestly believe it*, even to the retailing of slander, when not with evil intent.

I therefore insist, that the holding of the court in this case establishes, to say the least, a seeming inconsistent proposition of law, and a doctrine, as I think, unsupported by authority. It establishes the practice, that, if a defendant has not personal knowledge of the matters he seeks to controvert by his answer, although he may have *full information* thereof, which he *believes to be true*; yet, nevertheless, he must be turned out of court, *unless* he will consent to the commission of downright perjury by swearing that he has not, and cannot obtain knowledge or information sufficient to base a belief upon; or, in other words, if he *has a belief*, he cannot answer unless he will swear that he has *not* a belief. Such holding, such construction of our statute, is not in my judgment liberal, with a view to substantial justice. In many cases it would defeat the end of justice. It is wrong in principle, bad in tendency. It superinduces perjury, turns out of the temple of justice suitors, whose convictions of honesty, truth and right, would not allow them, by resort to perjury for worldly gain or the maintenance of right, to endanger their liberty here, or their happiness hereafter.

Not only for the reasons given above do I dissent from my brethren, but as well for the reason that I cannot see upon what authority the court below gave judgment for the plaintiff, without *disposing* of the answer by demurrer or motion, and without proof of the plaintiffs' claims for damages.

Under the New York Code (and perhaps that of California), it is expressly provided that in such case judgment may be rendered upon notice given to the opposite party; but, even then, if it is upon a complaint other than for the unconditional payment of money, an inquiry as to damages must be had; but no such provision is found in our statute. Judgments by default can only be rendered as provided in sections 30 and 53 of our Practice Act. Sham and irrelevant answers must be *disposed* of by motion or demurrer as provided in section 60 of that act. And no judgment can be rendered, as upon default, in any case under our civil practice, where an answer is pending until such answer

is disposed of as provided by statute. The court cannot in such case resolve itself into a common law or chancery court, and proceed to render judgment *pro confesso*.

But my brethren say that the motion for judgment in this case in effect operated as a motion to strike out, strike off, or in other words, to dispose of the answer, for the reason that it was *sham* or *irrelevant*. Concede this to be true, although a novel name and novel mode of procedure to dispose of a pleading under our statute, and how does it leave the case? It leaves a complaint for the recovery of damages upon default, upon which, as shown by the record, the court, *without proof*, proceeded to, and did, render judgment for the exact amount claimed in the complaint; and they say, that in New York the practice of *moving* for judgment on a sham answer has been sustained. That undoubtedly is true, the New York Code, as well as that of California, so provides; but even there the Code requires that an examination must be had and proof made as to the allegations of the complaint when not for the unconditional payment of money. And they refer to the case of *Lomme v. Kintzing*, 1 Mon. 295, as authority, where the court say: "Under our practice, where an answer raises no material issue, the plaintiff may either move that it be stricken out as sham and irrelevant *or move for judgment*." The court, when rendering this decision, must have had before them either the New York or California Code, whereby it is expressly provided in those exact words, that such proceeding may be had, whereas our statutes make no provision for *moving for judgment*. And yet this is all the court there say in answer to the able argument of counsel in support of the proposition that no judgment could be rendered upon the pleading without proof. I cannot think the court so intended. If it did, I cannot but think it bad law, and that its reversal will be hailed by the profession as one of much needed reformation.

But it is said, for this, no error is *assigned*, and therefore the court is not bound to search for error not assigned. It must be remembered that this case is here upon *appeal*, by which the *whole* case was removed to this court with the whole record before us, and the affirmance of the judgment below is virtually, and to all intents and purposes, the judgment of this court, and we are

bound to take notice of any error appearing upon the record, most especially, where it is so apparent.

I had prepared a more lengthy discussion of this case, but, being reminded by that commanding authority cited by counsel, "Many words, they darken speech," I substituted this, with the hope that those who may think me in error, will not only take the trouble to examine the question in connection with the opinion of the court, the legislation of the various States and Territories, and the authorities cited by counsel, but also to appeal to the legislative tribunal for relief against this seeming unjust discrimination between those who may, and those who may not, care for or *fear* the dangerous crime of perjury.

WADE, C. J., concurred.

GRISWOLD, appellant, v. RYAN, respondent.

PRACTICE — *time for taking appeals after judgment and rehearing.* G. commenced an action against R. in a justice's court, and an appeal was taken to the district court, where R. recovered judgment. G. made a motion for a rehearing, which was denied, and perfected this appeal within ninety days after the denial of the motion, but more than ninety days after the rendition of the judgment. The three hundred and sixty-ninth section of the Civil Practice Act provides that "an appeal may be taken * * * from a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment." *Held*, that the motion for a rehearing is not a matter of right, and does not affect the judgment, which is final until reversed. *Held*, also, that this appeal must be dismissed, because the same was not perfected within ninety days after the rendition of the judgment.

Appeal from First District, Jefferson County.

THIS action was commenced in a justice's court and thence appealed to the district court.

The respondent filed a motion to dismiss this appeal.

CHUMASERO & CHADWICK and G. G. SYMES, for the motion.

This court has no jurisdiction of the case. The appeal was not taken or perfected within ninety days from the time the judgment

appealed from was rendered. Civ. Pr. Act, § 369; *Dooling v. Moore*, 20 Cal. 141.

W. F. SANDERS and SHOBER & LOWRY, contra.

The action of the court below was not final until the motion for a rehearing had been overruled. This appeal was taken within ninety days from the time the motion was overruled. Judgment was not final while this motion was pending. The supreme court of the United States has decided that the ten days, within which an appeal must be taken to operate as a supersedeas, begins to run from the time a motion for a rehearing is overruled, and not from the time when the same was put on record.

WADE, C. J. This is a motion to dismiss appeal. There was a judgment for respondent in the court below, a motion for rehearing and an appeal to this court. The appeal was not perfected within ninety days after the rendition of the judgment, as required by the statute, but was so perfected within the required time, after the motion for a rehearing had been denied. It is claimed that, while this motion was pending, the judgment amounted simply to an order, and that no appeal could have been taken until the motion was disposed of.

The judgment below was final, until reversed or set aside, and barely filing a motion for this purpose does not change its character.

Motions for rehearing after judgment cannot be made as of course, or demanded as of right. Judgments are so far within the control of the court that rendered them, that, upon proper showing and for good cause, motions for rehearing will be granted. But motions of this character can have no force or effect whatever until such a case is made as will obtain leave of the court to file them. Leave should be first obtained upon proper case made, but such leave does not disturb the final character of the judgment. The placing on file of a motion for a rehearing, without any action by the court in the premises, does not in any manner affect the judgment, and does not prolong the time in which an appeal can be taken. *Columbia M. Co. v. Holter*, 1 Mon. 429.

The motion to dismiss the appeal is granted.

EDWARDS, respondent, v. TRACY, appellant.

TRUSTEE OF TOWN SITE—power—deed. The trustee of a town site upon the public lands, under the laws of the United States and this Territory, has no right to make a deed of a vacant lot to a citizen who is not in the possession of, or without the right of possession to, the premises.

SAME—not a court. Such a trustee has no judicial power, and cannot execute a deed of a town lot to an applicant who has not complied strictly with the law.

TOWN SITE—sole of unclaimed lots. The deed to an unclaimed lot in a town site is void, if the trustee has executed the same without advertising that it would be sold at public sale.

CASE AFFIRMED. The case of *Ming v. Truett*, 1 Mon. 322, holding that the statutes do not confer judicial powers upon the trustee of a town site in awarding deeds, affirmed.

EVIDENCE—record of case adjudged inadmissible. In the trial of an action brought by E. to set aside a deed delivered to T., the court erred in admitting as evidence the record of a case between T. and the trustee of a town site, in which T. failed to procure a writ of mandate, requiring said trustee to make said deed.

Appeal from First District, Gallatin County.

MURPHY, J., tried this action without a jury, and rendered a judgment for Edwards. A question relating to the settlement of the statement was determined at the last term, *ante*, 22.

STREET & TURNER, J. J. DAVIS, H. N. BLAKE and E. W. TOOLE, for appellants.

The duty of probate court in awarding lots under the town site act is ministerial, not judicial. *Ming v. Truett*, 1 Mon. 322.

Respondent must show that he complied with the statutes before he can question the title of appellant. *Burrell v. Haw*, 40 Cal. 377; Sts., 1867, 60; 1869, 80, 83; 1870, 67.

Respondent's application and proof do not entitle him to the deed he received from the trustee of town site. Respondent had neither possession nor right of possession. A vacant lot could be sold at public sale. Sts., 1870, 67.

The documentary evidence offered by respondent was incompetent. The application, proof and deed from Noble did not comply with the law. The proceedings in *Tracy v. Noble* were irrelevant. They established no right claimed by respondent. The

lot in controversy had been occupied continuously by appellants from 1865.

Respondent cannot maintain this action for equitable relief, as he does not show that he ever had possession of the lot in controversy. *Van Vleet v. Olin*, 4 Nev. 95; *Brumagim v. Bradshaw*, 39 Cal. 25, and cases cited.

The acts of trustee of town site are void, if not in conformity with laws of congress and regulations of the legislature. 2 Br. Dig. Laws U. S., 395, § 48.

PAGE & COLEMAN and S. WORD, for respondent.

No brief on file.

KNOWLES, J. The defendants appealed to this court from a decree setting aside a certain deed from one Parsons, as probate judge and trustee of the town site of Bozeman to lot No. 3, in block F, in said town, and also a deed from Tracy to Story to said lot, on the ground that the same was fraudulent and void. It appears, from the record, that the respondent filed an application to purchase this lot of John L. Noble, a probate judge of Gallatin county, to whom the town site of Bozeman had been, before that time, conveyed for the use and benefit of the occupants thereof, according to their respective interests; and that, to this end, he filed the following paper:

“To the Probate Judge of Gallatin County, in the Territory of Montana:

“The undersigned, a citizen of the town of Bozeman, in said county, claims and hereby makes application to purchase the following described premises, the same being a part of the tract entered for a town site for said town, to wit: Lot No. 3, in block F, as the same is designated upon the original plat of said town, approved and now on file in the office of the recorder of said county. And the said Thomas R. Edwards makes the following statement, constituting the grounds of his claim thereto, and of his right to purchase the same, namely: That said lot is vacant and unclaimed by any other party; that the improvements upon said lot consist of —, of the value of — dollars; that the

value of said lot is about \$100; that the same is now occupied by —; that the right to the possession and occupation is in the said Thomas R. Edwards.

“(Signed) THOMAS R. EDWARDS.”

This application, it appears, was filed April 11, 1870.

Afterward, it appears that the said probate judge made the following record, namely :

“Be it remembered, that on this 1st day of July, 1870, Thomas R. Edwards submitted to the undersigned, probate judge of said county, the testimony of R. P. Vivion and R. H. Crawford, who, on being duly sworn according to law, concerning his right to a conveyance of the ground described in the above application, from which testimony it appears that the matters stated in said *application are true*; and it appearing that the claim of the said Thomas R. Edwards aforesaid is not contested, it is awarded that the said Thomas R. Edwards is entitled to a deed conveying to him the ground aforesaid.

“Dated the 1st day of July, A. D. 1870.

“JOHN L. NOBLE, *Probate Judge*.”

It appears further, in pursuance of these proceedings, the said Noble executed to the plaintiff a deed to the said lot 3. This deed was offered in evidence in this case, and duly objected to by the defendants, which objection was overruled and the deed admitted; to which ruling the defendants excepted. This ruling of the court we will now consider. The first clause of the act, under which the said Noble became vested with the title to the site of the town of Bozeman, is as follows :

“Whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a town site, and therefore not subject to entry under the agricultural pre-emption laws, it shall be lawful, in case such town shall be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town may be situated, to enter, at the proper land office, and at the minimum price, the lands so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust,

as to the disposal of the lots in such town and the proceeds of the sales thereof, to be conducted under such rules and regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated." 14 U. S. Sts., 541, § 1.

Another clause of said section is this: "And provided, further, that any act of said trustees not made in conformity to the rules and regulations herein alluded to shall be void."

This brings us to the consideration of what rules and regulations, as to the disposal of town lots in towns whose site has been so entered in trust; the legislative assembly of Montana has enacted: "An act relative to the pre-emption of town sites upon public lands, and the disposal of trusts created thereby," approved December 12, 1867; is the first of a series of acts upon this subject by the Montana legislative assembly. Laws 1867, p. 60.

Section 5 of said act provides that any claimant must file a statement of his claim within two months after notice of entry; and section 6 provides: "Such statements shall be made in writing, signed by the party or parties making the same, and verified by the affidavit of such party or parties, and shall be recorded at length in a well-bound book to be provided and kept for such purpose by such incorporate authorities, or judge of probate, as the case may be. Such statement shall specify the grounds of such claim, particularly describing the lot or lots claimed, the date, as near as may be, of the occupation of said lot or lots, and by whom; what improvements have been made on said lot or lots and the value thereof; and that such lot or lots are now actually possessed and occupied by such claimant, or that the right to such occupation is in the claimant, if such lot or lots are occupied by another."

This provision of the statute evidently has reference to a claimant, who is the occupant of a lot, or has the right to the possession when occupied by another. The claim to enter a lot by one out of possession, or without the right to the possession, does not come within the purview of this section. The applicant in this case bases his right to the possession upon the fact that no one else occupies the same, and that it is vacant. These give no such right. There was no right vested in the trustee, who in this case

was Noble, to make a conveyance of a lot upon such an application as the one presented by the plaintiff above in this case. There is no other provision of the above-named act that can, by any fair construction, have any reference to the right of a claimant to enter a town lot in any town site, pre-empted as this was.

In January 14, 1869, the above-named act was amended in some particulars and additional provisions enacted. Sts. 1869, 80. The second section requires some additional proof, where the applicant desires to enter more than two lots. This section is an amendment to section 8 of the aforesaid act. Section 3 of this amendatory act provides for the entry of a lot by a person who has actually settled upon it, and provides what the application must set forth.

On the 6th day of January, 1870, this third section of the above-named amendatory act was amended. Laws 1870, page 67. Section first of this act is: "That section three (3) be amended so as to read as follows, to-wit: That the residue of lots in the possession of the corporate authorities, or probate judge, as the case may be, and unclaimed after the expiration of sixty (60) days, it shall be the duty of the probate judge or corporate authorities, as the case may be, to post up notices or cause the same to be done in at least four public places in the county in which such town site is located, at least ten days before sale, that he will offer and sell at public sale all of, or so many as he may think proper, of the lots that may remain unclaimed at the time advertised; and that all lots, having been thus advertised and offered for sale, not bringing at least the minimum price as set forth in an act, of which this is amendatory, shall be subject, at any time thereafter, to private entry at the minimum price."

It is apparent, from this act, that no lots in any town site, unclaimed, can be subject to private entry until they have been first advertised and offered for sale at public vendue. There is nothing in the record that shows that this lot in dispute was so offered.

Noble, in entering this town site, acted as a trustee. He held the title thereto as trustee. He had no power to make a deed to any portion of said town site in any other capacity than that of trustee, and as a trustee he must have fully complied with all the requirements of the statutes making rules and regulations for the

entry of town lots in such cases. Nothing will be presumed as to his acts. Those claiming under a trustee in such cases must show that he complied with the law. For without a compliance with these rules and regulations, he had no authority to make the deed. He had no authority to make a deed without first having advertised this lot for sale at public vendue. As it does not appear that he did this, the deed to the plaintiff was void. The provision of the statute which authorized him to receive the trust, we have seen, provided: "That any act of said trustees, not made in conformity to the rules and regulations herein alluded to (namely, those enacted by the legislative authority of the Territory), shall be void."

The selling of a lot, not in conformity with the rule requiring that it should be first advertised and offered for sale at public vendue, was an act of the trustee that rendered his deed to plaintiff void. It was error in the court therefore to admit this deed in evidence. In this case the respondent must stand upon his paper title. He has no possession. That being void, his action must fall. He must first show that he has some right to have the deeds of the defendants canceled and declared fraudulent and void, before he can ask the court to do so.

It was error in the court, therefore, to allow the plaintiff to introduce his deed in evidence, without first showing that the trustee had complied with the law, and was thus empowered to make the deed.

The second error we will notice is the admission of the record in the case of *Tracy v. Noble*. That was an action asking a writ of mandate, requiring Noble, as trustee, to make the appellant, Tracy, a deed to this lot with others. That record decided nothing in this case. It could not be set up in bar to this action. It might be true that Tracy was not in a position to compel Noble to make a deed to this lot, and that is all that it could be introduced for, and it could not be introduced to show that Noble had a right to make the plaintiff in this case a deed to the lot. As we have seen, the law must be fully and strictly complied with before the trustee would have that right. The fact that the appellant, Tracy, had failed to comply with the law, does not prove that the plaintiff did, or that Noble did, in making the plaintiff a deed to

the lot in dispute. If the court took the record in that case into consideration, and we must presume that he did, then there was error in admitting that record, which prejudiced the defendants.

Noble, in awarding a deed to plaintiff, acted as a trustee, and not as a court. This court has already intimated in the case of *Ming v. Truett*, 1 Mon. 322, that it did not consider that a probate judge, vested with the title to a town site, acted in disposing of it in any judicial capacity. He was simply a trustee. Hence, the awarding to plaintiff a deed to the lot in dispute, we do not consider in any sense an adjudication.

We do not think it necessary to discuss the validity of Tracy's deed from Parsons. When a case is presented by some one, who has the right to dispute its validity, it will be appropriate to do that.

For these reasons, the judgment of the court below is reversed, and the cause remanded.

Judgment reversed

HARVEY, respondent, v. WHITLATCH, appellant.

AFFIRMANCE OF JUDGMENT IS VOID WITHOUT LEGAL APPEAL. The affirmance of a judgment by this court is void for want of jurisdiction, if the plaintiff obtains the same by mistake or fraud, and perfects the appeal without the knowledge of the defendant, who had abandoned his appeal after filing the notice and undertaking therefor in the court below.

JUDGMENT VACATED ON MOTION. A void judgment can be set aside by this court upon a motion made at a term subsequent to that in which it has been entered.

THIS case is reported in 1 Mon. 713. The appellants filed a motion to set aside the judgment of this court, rendered at the January term, 1873. The respondent moved to strike the cause from the docket.

CHUMASERO & CHADWICK and TOOLE & TOOLE, for appellants.

After appellants abandoned their appeal, respondent could not file the transcript, and thereby give this court jurisdiction. A

judgment so obtained against appellants can be controlled by this court. *Rowland v. Kreyenhagen*, 24 Cal. 57.

Respondent could procure the certificate provided for in the second and third rules of this court, and have the appeal dismissed. Civ. Pr. Act, § 379.

Appellants had the right to abandon their appeal, and thereby relieve their sureties on their undertaking.

SHOBER & LOWRY, for the respondent.

WADE, C. J. This is a motion to vacate a judgment of this court rendered at the January term thereof, 1873.

The following facts appear in the case. At the July term 1871, of the district court for the third district, there was a trial, verdict for plaintiff, and an order for judgment on the verdict. The defendant gave notice of appeal to the supreme court, and filed an undertaking therefor in pursuance of the statute, and procured a transcript of the case, and caused it to be filed with the clerk of this court. It was then discovered that the judgment below had not been entered by the clerk in pursuance of the order for judgment and the appeal was dismissed. At a subsequent term of the district court, on motion by the plaintiff, judgment was entered *nunc pro tunc*. After the entry of this judgment it further appears, that the plaintiff, by his attorney, and without the knowledge of the defendants, procured a transcript of the case or such parts thereof as suited his purpose, and caused the same to be filed in this court.

The case was called for hearing in the last days of the January term, 1873, and after the departure from the court of the attorneys for defendants, who tried the case below. The court refusing to hear the case in the absence of defendants' attorneys, and without notice to them, a telegram was produced from an attorney in the third district saying that the defendants did not wish to appear and be heard in the case. Whereupon the judgment below was affirmed, whereby the liability of the sureties upon the undertaking for appeal became fixed.

The defendants now move the court to vacate the judgment, upon the ground that, after giving the notice and undertaking for

appeal, and after the entry of the judgment *nunc pro tunc*, they, acting under the advice of their counsel, abandoned the appeal, and for this reason did not apply for or obtain a transcript of the case after the entry of the judgment below; that the attorney who assumed to represent them by the telegram was never an attorney in the case, and had no authority whatever to act in any capacity in the premises, and that they had no knowledge that a transcript had been procured by the plaintiffs.

The grounds for this motion are amply supported by the affidavits of the defendants and their attorneys, and not being controverted by the plaintiff, are undoubtedly true.

Under this state of facts we must say that in procuring the judgment here the court was imposed upon either designedly or by mistake, for no judgment could have been had, and the case could not have been heard even, except for the telegram saying the defendants did not wish to appear, which telegram was unauthorized, and unknown to defendants. If the imposition was designed and was perpetrated by an attorney of this court, it would be such an offense as would disbar and disgrace him, but if occurring by accident, mistake or ignorance, however humiliating to the party, no blame would attach.

In order to give this court jurisdiction to hear a case on appeal, the appeal must be perfected in the mode and manner prescribed by the statute. It certainly is not a compliance with the statute for the plaintiff, after notice and undertaking for appeal by the defendant, and after an abandonment of the appeal by him, secretly and sily to procure a transcript without the knowledge of the defendant, thereby perfecting the appeal, and then, in the absence of the defendant or his attorneys, and with no notice to him or them, by fraud or mistake, procure an affirmance of the judgment, for the purpose of bringing a suit therefor against the sureties upon the defendants' undertaking for appeal.

An appeal taken in this manner, and a judgment obtained by these means, and for this purpose, cannot be maintained. It is simply void. It stands in precisely the same situation and is of the same validity, as if the judgment below had been obtained against the defendants, without any summons or notice to them of

the pendency of the suit, which judgment thus obtained would be of no validity anywhere.

We do not doubt that, by a rule of court, after notice and undertaking for appeal by the defendant, and a failure by him to cause a transcript to be filed in this court, the plaintiff, upon proper notice to the defendant, could cause a transcript to be filed here, and could cause the case to be heard by this court, but before such hearing the defendant must have notice thereof, and an opportunity to examine the transcript to see that it presents the whole case, and that nothing material to him has been omitted. But in the absence of such notice the judgment obtained would be of no more validity than a judgment below without summons or notice to the defendant.

The case at bar illustrates the danger of hearing a case here upon a transcript, which the defendant has not seen, and which he has had no opportunity to see. The transcript does not purport to be entire and complete. It is apparent therefrom that it does not contain the entire record of the case. Being procured by the plaintiff for his own purposes, it evidently contains only such matters as present his side of the case; or, at least, never having been examined by the defendants, this state of things might exist, and for all that does appear, portions of the transcript, vital to the rights of the defendants, may have been omitted, and, judging from the manner in which the transcript was obtained, this is very likely true.

We, therefore, hold that the judgment thus obtained is void; not voidable only, but absolutely void, and the only remaining question relates to the authority of this court at a subsequent term to vacate and set aside a void judgment, upon motion.

As a general rule, a judgment imports absolute verity, and cannot be impeached or called in question until reversed by writ of error, bill of review or other suit for that purpose. There is a leading distinction between judgments and decrees merely void and such as are voidable only. The former are binding nowhere, the latter everywhere, until reversed by a superior authority. In the case of a void judgment, the more modern authorities hold that the court in which the same was rendered may, at any subsequent term thereof, set aside and vacate the judgment upon

motion, and especially so in cases where the rights of no third persons have intervened, as in the case under consideration.

The circuit court may set aside a judgment of a former term, rendered on default of a defendant who had no notice of the action; such judgment being merely void, the court has power summarily to declare it to be inoperative, and to stop all proceedings under it. *Harris v. Hardeman*, 14 How. (U. S.) 334.

In the case at bar, the defendants having no notice of the hearing in this court and no notice that a transcript therein had been filed, stand in the same relation to the judgment as if the same had been rendered against them below, without notice and by default, and is, therefore, controlled by the same considerations as the case of *Harris v. Hardeman*.

Where no process is served on a defendant, and an attorney enters an appearance for him, without authority (as in the present case), the court rendering such judgment may set it aside at a subsequent term. In such a case, the remedy at law being adequate, a court of equity will not interfere. *Abernathy v. Latimore*, 19 Ohio, 286.

A judgment irregularly entered may be set aside at a subsequent term, on motion. *Hunt v. Yeatman*, 3 Ohio, 15.

Many other authorities might be cited to support the proposition that a void judgment may be set aside and vacated by the court that rendered the same, on motion, at a subsequent term.

Therefore, the judgment herein is declared a nullity, and the same vacated and set aside, and the cause stricken from the docket, at the costs of plaintiffs for this appeal, and the remit titor heretofore issued herein is vacated.

Judgment vacated.

BARKLEY, appellant, v. TIELEKE, respondent.

WATER RIGHT — *remedy of claimants.* Equity affords the appropriate remedy in an action in which both parties claim the prior right to the use of water for mining purposes.

CONVEYANCE OF WATER RIGHT—*possession*. Under the laws of this Territory, the transfer of a ditch and water right requires the same form and solemnity as a conveyance of real estate; but an interest in such property can be acquired by appropriation.

IMPERFECT CONVEYANCE OF WATER RIGHT—*abandonment*. The attempt to convey a water right by an imperfect deed operates as an abandonment of the title obtained by the appropriation thereof.

RECAPTURE OF WATER—*estoppel*. The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another.

ACTION BY POSSESSOR OF WATER RIGHT. A party who is in the possession of a ditch, and the water incident thereto, has an equitable interest therein, and can maintain an action against trespassers.

Appeal from First District, Jefferson County.

THE judgment in this action was rendered by SERVIS, J., who tried the cause without a jury. The opinion refers to the following sections of the act relating to "conveyances of realty." "Every conveyance in writing, whereby any real estate is conveyed, or may be affected, shall be acknowledged or proved and certified in the manner hereinafter provided." Cod. Sts. 396, § 3. "The term 'real estate,' as used in this act, shall be construed as co-extensive in meaning with lands, tenements, hereditaments, and possessory titles to public lands in this Territory." Cod. Sts. 402, § 34.

S. ORR and TOOLE & TOOLE, for appellant.

This is an equitable action, and the only remedy the appellant has. The court below found all the facts for appellant.

The deeds and delivery of possession thereunder by the grantors of appellant conveyed a sufficient title, as against said grantors, to enable appellant to use the water in controversy. Respondents, to avail themselves of an outstanding title in a third party, must show such a title as would prevail against appellant. The court below put too much stress on the subject of original appropriation. The grantors of appellant had actual possession of the water and ditch, and delivered the same to appellant. Appellant has a title by the abandonment of his predecessors and his first possession, or the equitable title acquired by the deeds, and possession thereunder.

Respondents do not connect themselves with the first appropriator of the water, and must stand or fall on their appropriation, and their rights thereunder, at the date of the same. Appellant's motion for a decree should have been granted. Yale on Mining Claims, 378-9, 102; *Ortman v. Dixon*, 13 Cal. 33; *McDonald v. Bear River & A. W. & M. Co.*, 13 id. 220; *Table M. T. Co. v. Stranahan*, 20 id. 198; S. C., 21 id. 548.

G. G. SYMES and CHUMASERO & CHADWICK, for respondents.

A perpetual injunction will not be granted, unless the party applying therefor proves his legal title beyond a reasonable doubt. 2 Story's Eq., § 925; *Parker v. Winnipiseogee C. & W. Co.*, 2 Black, 545. Appellant must go into a court of law and establish his legal right before he can procure an injunction. *Irwin v. Dixon*, 9 How. 28; *Miss. & Mo. R. Co. v. Ward*, 2 Black, 495.

Appellant was not prior appropriator, and failed to show a sufficient conveyance from the prior appropriator. The right to water is real estate, and a deed thereof must be duly acknowledged, according to the Territorial statute. Cod. Sts. 396, §§ 1, 3, 34, 35; Angell on Water-courses, 168, 172; 2 Black. Com. 17; Yale on Mining Claims, 112, 114, 204, 215, 252, 379; *American Co. v. Bradford*, 27 Cal. 360; *Union W. Co. v. Crary*, 25 id. 509.

Respondents showed a title by appropriation, and appellant showed no title in parties under whom he claims. Respondents had possession when suit was commenced, and appellant must recover on the strength of his own and a better title. *Hawthurst v. Lander*, 28 Cal. 332.

The California decisions cited by appellant are not applicable. They were made in California, under a law allowing running claims and water rights to be transferred by delivery of possession, before the act of 1860. *Patterson v. Keystone M. Co.*, 30 Cal. 360; *Goller v. Fett*, id. 481.

No adverse possession was shown by appellant. *Copper H. M. Co. v. Spencer*, 25 Cal. 18.

S. ORR and TOOLE & TOOLE, for appellant, in reply.

The right to water may be lost by abandonment. Such right

may be proved by parol and rests, as between contestants, upon priority of possession. There are no facts to be settled by a trial at law. The court below found them. No stranger can deprive appellant of his rights, for want of proper title. Appellant's possession is good. Hill. on Inj. 9, 283; Browne on Frauds, §§ 135, 136, 467, 468, 131.

The water is but an incident to the ditches of appellant, the title to which is not disputed. Appellant recaptured the water by his ditch, after his grantors abandoned it, and was as much an original appropriator as if he had dug the ditch.

SERVIS, J. The plaintiff appeals to this court from the judgment of the court below, refusing a perpetual injunction.

The plaintiff and defendants both owned valuable mining ground, below Indian creek, in Jefferson county, Montana Territory, and owned ditches conveying the waters therefrom to said mining ground. The plaintiff's ditches were known as the "Freeman ditch" and the "Cedar gulch ditch." The defendants' was known as the "Tieleke ditch." Both claimed prior right to the waters of said creek. The findings of the court below sufficiently state the facts, which findings are as follows:

"First. The Freeman ditch was constructed in 1866, and diverted and appropriated 100 inches of the waters of Indian creek in that year.

Second. The Cedar gulch ditch was constructed in the year 1867, and diverted and appropriated 150 inches of water from said Indian creek in that year.

Third. That the Tieleke ditch was constructed by defendants in the year 1868, as original appropriators, and diverted and appropriated 500 inches of water from said Indian creek in that year.

Fourth. That both of said first-mentioned ditches were constructed by various persons other than the plaintiff or his immediate grantors, prior to the construction of the said Tieleke ditch, whereby the defendants sought to and did take the waters from said Indian creek against the will of the plaintiff after his purchase of the first-named ditches.

Fifth. That the plaintiff and defendants respectively own valu-

able mines of gold, upon which they desire to use said water; and the said mines and ditches are comparatively worthless without the use of said water.

“Sixth. That the water of said Indian creek, during a good portion of the mining season, does not exceed 150 inches, and during some portions of the mining season does not exceed 250 inches of water; and that the respective claims of the parties are hostile, and, for a great portion of the mining season, one must give way to the other.

“Seventh. That the various persons constructing the Cedar gulch ditch and the Freeman ditch, by certain unsealed and unacknowledged paper writings, purported to convey their respective interests therein to certain persons other than the plaintiff’s grantors, but who, thereafter, and in like manner, by like paper writings, transferred the same to plaintiff’s grantors, who took possession thereunder (and not by appropriation) prior to the appropriation and construction of the Tieleke ditch, who thereafter conveyed the same to plaintiff.

“Eighth. That one Freeman (to whom a part of the same had been so conveyed), in the year 1870, by deed duly executed, acknowledged and delivered, conveyed all his interest in said ditches to the plaintiff; and that Wilcox and Doughty (to whom the balance had been so conveyed), on the 6th day of September, 1870, by deed, conveyed all their interest in said ditches and water to said plaintiff, which deeds were, in all respects, in due form of law, except the acknowledgment thereof by Wilcox, which was done before a deputy county clerk of Montana Territory.

“Ninth. That the words “dump ground,” as appears in the deed from said Wilcox and Doughty, were, by the consent of one of the grantors thereof, inserted therein after the delivery and recording of the same.

“Tenth. That the respective parties, up to the year 1870, mutually divided the waters of said Indian creek, and for the latter part of the year 1870, defendants, by compromise with Wilcox and Doughty, used all the waters of said Cedar gulch ditch.”

The plaintiff insists that, under the facts, as found by the court, there is shown to exist at least such an equitable title to the property in question as to entitle him to the relief demanded.

The defendants insist, that before relief can be had under the claim made by plaintiff, he must resort to an action at law to settle the legal title to the property in question. That, by the law of this Territory, such property is declared to be real estate, requiring, for a conveyance thereof, the same form and solemnity as of real estate in fee simple; that no such conveyance is shown to have been made to the plaintiff's grantors; and that, therefore, their appropriation of the waters of Indian creek is superior to plaintiff's.

Upon a review of the authorities, we are satisfied that chancery is a well-defined remedy for relief in an action in the nature of a nuisance, of which this clearly partakes, without resort to an action at law. In fact, equity seems to be the only appropriate remedy to afford relief in cases like the one under consideration.

As to the *character* of the property or right in dispute, it is true, under our law, it is such a species of realty as to require for its transfer the same form and solemnity as the conveyance of any other real estate. Cod. Sts. 396, § 3; 402, § 34. Yet we can readily see how *an* estate or an *interest* in such kind of property can be acquired without such formality of conveyance.

Under the law of congress, a *grant* of the kind of property in question is *presumed* by the act of appropriation. This may be lost by surrender or abandonment.

The conveyance or transfers of the property to plaintiff's grantors alone was not sufficient under our statute to convey the property to them; but the attempt so to do by imperfect conveyances, if it did not operate as an absolute or equitable conveyance, clearly operated as a surrender or an abandonment of their right, title and interest acquired by appropriation, which was the digging of the ditches in question. The *title* to these ditches is not controverted by the defendants, but only the waters of Indian creek carried through them. The water is but an incident to the ditches, and the right acquired to use it may be lost by abandonment, and when so lost, it becomes (*publici juris*) public property again, and subject to be recaptured, and when so recaptured, the original appropriators are estopped from reasserting their claim to it; and if they are estopped, wherein can a stranger assert or claim any right to such property?

The defendants in no manner connect themselves with the plaintiff's title, unless it be their claim of prior appropriation, which is simply possession, the priority of which necessarily determines the question under consideration.

The pleadings and findings of the court establish the fact that plaintiff's grantors had obtained actual and rightful possession of the property in question, prior to the construction of the Tieleke ditch by defendants, and that they continuously retained such possession until they conveyed the same to plaintiff, who, in like manner, continued the possession thereof until interfered with by the defendants.

If the conveyances to plaintiff's grantors did not in fact transfer such an interest as entitled them to all the rights of their grantors, then the right was abandoned, and the possession thereof taken by plaintiff's grantors was as much an original appropriation of the waters of Indian creek as if they had originally constructed the first ditches to divert the same. Such possession, even if it did not determine the *ownership* under the act of congress of March, 1866, does nevertheless vest in the plaintiff such an equitable interest as to entitle him to maintain this action.

From all the facts and circumstances, we cannot refrain from expressing our conviction, that the defendants, when they located and constructed their ditch, did it with reference to, and with full knowledge of, the prior rights of the Freeman and Cedar gulch ditches.

We are, therefore, of the opinion that the court below erred in refusing to decree a perpetual injunction against the defendants. The judgment of the court below is therefore reversed, with costs to be taxed against defendants.

The findings of the court below being, that the Freeman ditch conveyed 100 inches of the waters of said Indian creek, and that the said Cedar gulch ditch conveyed 150 inches of the waters of said creek, the injunction should therefore be so far made perpetual in favor of said plaintiff and against said defendants, and judgment is hereby rendered accordingly.

Judgment reversed.

DEER LODGE COUNTY, appellant, v. KOHRS, respondent.

PROBATE COURTS—*jurisdiction defined by legislature.* The ninth section of the Organic Act of the Territory provides that "the jurisdiction of * * * probate courts * * * shall be limited by law," and thereby confers upon the legislative assembly the power to regulate the probate jurisdiction of the probate courts.

SAME—*cannot render judgments for waste.* The probate courts can make necessary orders for the settlement of the estates of deceased persons, but cannot render judgments against administrators for receiving moneys belonging to estates and failing to account therefor.

SAME—*jurisdiction is not limited by amount involved.* The second section of the amendment to the Organic Act, approved March 2, 1867, provides that the probate courts, "in addition to their probate jurisdiction, are hereby authorized to hear and determine civil causes wherein the damage or debt claimed does not exceed \$500," and certain "criminal cases." *Held*, that this section does not affect the probate jurisdiction of the probate courts.

"Civil action" defined—*trial—judgment.* In a civil action, the issues are formed by the averments of the complaint and denials of the answer or replication to new matter; and the trial of these issues takes place by the introduction of legal evidence to support the allegations of the pleadings, and the judgment is conclusive upon the rights of the parties.

SAME—*proceedings in probate courts.* Proceedings charging an administrator with the commission of waste are not civil actions within the meaning of said Organic Act.

Appeal from probate court proceedings. An appeal is not allowed from the summary proceedings of the probate courts in determining charges of waste against administrators.

Appeal from Second District, Deer Lodge County.

KOHRs was the administrator of the estate of Frederickson, deceased. The Board of County Commissioners of Deer Lodge County commenced this action in behalf of the county, which was a creditor of the estate. The probate court entered judgment in favor of Kohrs, January 25, 1873. An appeal was then taken to the district court and dismissed by the court, KNOWLES, J., upon the motion of Kohrs.

J. C. ROBINSON, District Attorney, Second District, and CHUMASERO & CHADWICK, for appellant.

The Organic Act and amendment thereto give probate courts

entire jurisdiction of the acts of administrators in taking charge of estates of deceased persons. These are the only courts that can call administrators to account for malfeasance in the performance of their duties. Creditors can apply for an inquiry, if administrator has not made just accounts, and probate courts can direct issues to be tried thereon. Cod. Sts. 365, §§ 272, 274.

The district court had jurisdiction of this case. The probate court could act and decide the questions of waste and the amount thereof. An action could be brought, based on such findings of waste, in some court having jurisdiction to render judgment for the amount so found. Congress intended that probate courts should render judgment for the amount of such waste.

The second section of the amendment to the Organic Act extended the power of probate courts. "In *addition* to their probate jurisdiction," is the language used. The limitation of the jurisdiction to \$500 applies to what are legitimate civil cases. Unless probate courts can render judgments in matters belonging to their probate jurisdiction, no proper or effectual administration of estates can be had.

SHARP & NAPTON, for respondent.

The probate court did not have jurisdiction of this action. Amendment to Organic Act, § 2; Civ. Pr. Act, § 628; Burrill and Bouv. Dict., "Probate."

WADE, C. J. The only question involved in this case relates to the jurisdiction of the probate court. This action was commenced in the probate court of Deer Lodge county, and from thence appealed to the district court, wherein it was decided that the probate court had no jurisdiction in the case, and from this decision appeal was taken to this court.

The complaint charges that the administrator committed waste in this, that he converted to his own use about \$1,800 worth of the property of the estate, and failed to account for the same to the estate or to the creditors thereof, of whom this plaintiff is one, and asks a judgment against such administrator for double the amount of the property thus wasted, in pursuance of a provision of the statute.

It is claimed that this proceeding is a *civil action*, and that, by virtue of section 2 of the amendment to the Organic Act, wherein it is provided that probate courts, in addition to their probate jurisdiction, shall have authority to hear and determine civil causes, wherein the debt or demand claimed does not exceed \$500, necessarily excludes the jurisdiction of the probate court to hear the matters herein involved, for the reason that more than \$500 are in dispute.

To decide this case properly it will be necessary to determine what is meant by the term "probate jurisdiction," as used in the Organic Act.

The Organic Act provides (section 9) that the jurisdiction of the probate courts shall be limited by law.

This section, therefore, confers upon the legislature authority to define the probate jurisdiction of this court, and, in pursuance of this authority, the legislature has bestowed upon such courts jurisdiction as follows:

Civ. Pr. Act, § 626. "There shall be in each county a probate court, with the jurisdiction conferred by this chapter."

The jurisdiction conferred by the chapter, so far as it affects this case, is as follows:

Civ. Pr. Act, § 627. "The probate court shall have power to open and receive the proof of last wills and testaments, and to admit them to probate; to grant letters testamentary of administration and of guardianship, and to revoke the same for cause shown, according to law; to compel executors and administrators and guardians to render an account when required, or at the period by law designated; to order the sale of property of estates, or belonging to minors; to order the payment of debts due by estates; to order and regulate the partitions of property or estates of deceased persons; to compel the attendance of witnesses; to appoint appraisers or arbitrators; to compel the production of title deeds, papers or other property of an estate or of a minor, and to make such other orders as may be necessary and proper, in the exercise of the jurisdiction conferred on the probate court."

Here is the jurisdiction of the probate courts, as it relates to the settlement of estates, and it will be observed that, although

the court can make all the necessary orders in the premises, it cannot render judgments.

By virtue of this section, the probate court is clothed with authority to appoint administrators, and, therefore, to place in their hands the property belonging to estates, and to compel a settlement and distribution of the property. And by appropriate legislation, and in order to carry out and to exercise the jurisdiction conferred by the foregoing section, the probate court has authority to cause an administrator to file an inventory of the estate; to cite such administrator to render an account at any time; to hear exceptions to his accounts; to hear charges against him or other persons for embezzling the property of the estate, and also to hear charges as to the commission of waste by such administrator. All these powers and this authority necessarily grow out of the jurisdiction conferred by section 627, and are purely of probate jurisdiction, and are not affected by the \$500 limitation, contained in section 2 of the amendment to Organic Act, because they are not civil actions. All this authority is necessary to properly preserve and administer an estate. But it was not contemplated by the legislature that judgments could be rendered against an administrator in any of these cases, for the probate court, when exercising its probate jurisdiction as conferred by section 627, makes orders but does not render judgments. And so it is, if the accounts of an administrator show a deficiency, the court can order the amount due from the administrator to be paid to the persons legally entitled to receive the same, and if the order is not obeyed, the only remedy is to bring a civil action in a court of competent jurisdiction for a judgment. And so upon an order of distribution the probate court cannot enforce the order, but if the distributive share is not paid as ordered, the order and proceedings of the probate court lay the foundation for a civil action, wherein judgment and execution can be had. Therefore it is that actions to compel an account to be rendered, to hear exceptions to accounts, for embezzling the assets, for waste against an administrator, or for the distribution of an estate, are not *civil actions*, but are *proceedings*, and come within the direct line of probate jurisdiction.

The case before us was for waste, that is, the administrator was

charged with receiving about \$1,800 belonging to the estate, and failing to account for the same. There is no doubt but that the probate court had authority to inquire, in a summary manner, as to the facts charged, and to make an order thereon, but not to render a judgment, because the mode of trial is not such as would support and make valid any judgment that might be rendered. That this is the meaning of the statute is evident. Section 274 of the act concerning administrators and executors, provides, "Upon such application (an application charging the administrator with waste) the court shall direct an issue to be made up, whether there be waste or not, which *shall be tried as demands against the estate.*"

How are demands against the estate to be tried? The same act, section 201, answers this question: "The probate court shall hear and determine all demands in a summary way without the form of pleading, and shall take the evidence of competent witnesses, or other legal evidence."

Then, if the administrator is charged with the commission of waste, the matter is to be tried as demands against the estate are tried, that is in a summary way, without the form of pleading. The statute, both as to demands against the estate and as to waste, provides for the rendition of a judgment. But can a judgment be rendered in this summary manner without a legal, formal trial? Can a judgment be rendered without pleadings, and without the legal formation of an issue? What would such a trial determine, and could it be plead in bar? A bar to what? There is nothing to show upon what the judgment was founded, and nothing by which any one could be informed as to what was tried and determined by the judgment. The whole proceeding would show simply a judgment, rendered upon an undefined issue, without pleadings, and as to what was tried, or what was left untried, no one could guess, much less legally determine. Such a judgment, rendered in this summary manner, would not bar a civil action in a court of competent jurisdiction upon the same subject-matter, so that the rendition of such a judgment by the probate court would amount simply to an order, and this is what was contemplated by section 627, wherein jurisdiction is conferred.

2. What is a civil action? It is an action wherein an issue is

presented for trial formed by the averments of the complaint, and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings, and a judgment in such an action is conclusive upon the rights of the parties, and could be plead in bar. But an action, the issues to which are made up in a summary way, without pleadings, without a formal issue, without any definite means of knowing what is to be tried, an undefined oral arrangement, a sort of inquisition, where charges are made in the dark, and where the party can have depositions taken at his own expense, but not otherwise, as provided in section 202, even if testimony should be thought necessary in such a trial, cannot be dignified by the name of a "civil action," and it hardly reaches the dignity of a "proceeding."

We therefore conclude that proceedings to establish demands against estates, or to charge an administrator with waste, are not civil actions within the meaning of the Organic Act, and are unaffected by the \$500 limitation contained in the amended act.

Upon an appeal from the probate court to the district court, the case shall be tried in the district court, upon the pleadings filed in the probate court. Thus enacts the statute. But, where there are no pleadings in the probate court, and no papers of any kind, it is impossible to see how such a case could be taken to the district court on appeal. No action in the district court, where a judgment can be asked for and rendered, should be tried in the absence of formal pleadings, wherein a distinct issue is tendered.

There would be no safety in rendering judgments, except upon an issue joined, for otherwise there might be several judgments rendered for the same cause of action. The statute does not contemplate an appeal from the summary informal proceedings before the probate court, to establish a demand against an estate, or upon a charge of waste, against an administrator. If an appeal was taken, and the case reached the district court, how could it be tried there? There would be no pleadings, and no papers. The transcript on appeal would simply show the rendition of a judgment. Shall the district court go through the same performance of trying a case without complaint, answer or replication, and permit either party to produce evidence, if he will pay for it, deny-

ing him the process of the court to bring in witnesses, to try an undefined, mysterious issue, which, when tried, leaves no traces behind it, to show what controversy the judgment determined? Such a thing could not have been contemplated by the legislature.

In the case at bar, there were formal pleadings presenting an issue, but they were filed in the case without authority of law, for the statute in a case of this kind directs a summary trial without pleadings.

We, therefore, conclude that in an action against an administrator, charging the commission of waste, the action is not a civil action, but a proceeding in which the probate court can make an order; and that, if it is desired to try the question in the district court, a civil action might be commenced there in the first instance, or after the findings of the probate court, making such findings the basis and foundation of the action.

The judgment of the court below dismissing the appeal from the probate court is affirmed.

Judgment affirmed.

McKIERNAN, appellant, v. KING, respondent.

APPEARANCE BY DEMURRER. This action was commenced in the district court of the Territory, and the respondents filed a general demurrer to the complaint of the appellant. *Held*, that the court thereby acquired jurisdiction of the parties.

JURISDICTION OF BANKRUPTCY MATTERS. The act of congress, establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, does not confer upon the district and circuit courts of the United States exclusive jurisdiction in all proceedings in bankruptcy.

SAME—suit by assignee. The district courts of the Territory have jurisdiction to hear and determine actions brought by the assignee of a bankrupt to recover the possession or value of property, from one who has received the same in violation of said act.

Appeal from Third District, Lewis and Clarke County.

WADE, J., sustained the demurrer of King *et al.* to the complaint.

W. F. SANDERS, for appellant.

No brief on file.

CHUMASERO & CHADWICK, for respondents.

The court below did not have jurisdiction of this case.

The district courts of the United States are constituted courts of bankruptcy, and have exclusive jurisdiction of proceedings in bankruptcy. U. S. Bankrupt Act, § 1. The supreme courts of Territories have had the same jurisdiction conferred upon them. Bankrupt Act, § 49.

The rights of appellant, as assignee of the bankrupt, are derived from the same act, § 14; Bump's Bank. (5th ed.), 323-4, and cases there cited. This case arises under the act, and must be determined in the court therein named. This action was commenced in the supreme court before the act was passed which confers jurisdiction upon the district court. No retroactive effect was given to the amendment, and the case could not be changed from one court to the other, a new tribunal. The supreme court did not lose jurisdiction.

This is not a mere civil remedy, which is sought to be enforced against respondents, but a penalty for receiving payment of a just debt due them from a bankrupt within six months from the filing of the petition for the adjudication of bankruptcy. Great force should be given to the objection that the amendment is not only retrospective but *ex post facto*. The constitutional provision in regard to *ex post facto* laws is applicable to this case.

KNOWLES, J. The point presented to the court for determination in this action is the jurisdiction of the district courts of this Territory to hear and determine actions brought by an assignee in bankruptcy to recover the value of goods, which were transferred, and for money which had been paid to respondents in violation of the provisions of the 35th section of the bankrupt act of the United States, approved March 2, 1867.

The complaint sets forth facts which show that one Cuthbert had been adjudged a bankrupt, that the appellant had been appointed assignee of his estate, and had qualified as such, and that the register in bankruptcy had duly conveyed to him the

estate of the said bankrupt; that goods, specified in the complaint, to the amount of over \$5,000, had been transferred to the respondents and a payment of some \$790 paid to them, and that both this transfer and payment had been made in violation of the provisions of section 35 of the said bankrupt act.

To this complaint the defendants interposed their demurrer, specifying, as their first ground thereof, that the court had no jurisdiction of the subject-matter, or of the defendants therein sued. Two other grounds of demurrer were specified, but these I will not consider, because they were not presented to the court either in the argument of the attorneys or in their briefs. The ground that the court had no jurisdiction of the parties cannot be well taken. Their general appearance in the action would give the court that, and there is nothing in the record presented to this court to show that the court below had not acquired jurisdiction otherwise. The district courts of this Territory possess general, original jurisdiction, and all the presumptions are in favor of the regularity of their proceedings. As to the other point, that the district court did not have jurisdiction of the subject-matter of the action, there may, perhaps, be more difficulty. The plaintiff is an assignee in bankruptcy, and receives his authority to act in any matter in reference to the trust reposed in him by virtue of the said bankrupt act. He receives, as assignee, the right to the possession of the bankrupt's estate by virtue of the conveyance made to him in accordance with the provisions of section 14 of said act. Section 35 does not vest in the assignee the title or the right to the possession of any of the bankrupt's effects, but the said conveyance is provided for in section 14.

The rule established by section 35, prohibiting the sale and transfer of the property of the bankrupt under certain conditions, or any payment to be made by him under the conditions prescribed, is of the same character as the statute of frauds. Both statutes make void contracts made under certain conditions. It seems to be conceded by the attorneys for the respondents that an assignee in bankruptcy can maintain a suit in a State or Territorial court for any property conveyed to him by the register, save property that had been transferred in violation of the provisions of section 35. Why this property should be vested with

any different character by virtue of that section, I am unable to perceive. It may be that the district and circuit courts of the United States have jurisdiction to hear and determine this cause. But does that preclude a State or Territorial court from having jurisdiction of it? The grant of jurisdiction to the circuit and district courts of the United States to hear and determine suits at law or in equity, where there is a dispute as to title to property, is made in the third clause of section 2 of the bankrupt act. This is an action at law of that character. The first section, it has been decided, does not grant such jurisdiction. *Bump's Bankruptcy*, 270, 271.

It has been repeatedly held that State courts, in the exercise of their ordinary original jurisdiction, may take cognizance of causes arising under the laws and constitution of the United States, unless the jurisdiction thereof has been exclusively vested in the United States courts. This jurisdiction of the State courts has been termed concurrent with the Federal courts. 1 Kent's Com. 426-434; *Teal v. Felton*, 1 N. Y. 537.

The question is now presented, does the bankrupt act vest the jurisdiction to hear and determine a suit, instituted by an assignee in bankruptcy to recover the possession or value of property from a party who had received it in violation of the provisions of the said section 35 of the bankrupt act, exclusively in the Federal courts? Section 35 provides that the assignee may recover the property or the value of it, which had been conveyed in violation of the provisions of that section, but it does not specify in what court actions for this purpose may be brought. Nor is there any other provision of this act which provides in what court such actions shall be instituted. The grant of jurisdiction to the circuit and district courts does not of itself give exclusive jurisdiction.

The district and circuit courts have jurisdiction to hear causes where persons are residents of different States. This, however, does not preclude a resident of another State from bringing an action in a State court where the defendant resides.

In *Bump's Bankruptcy*, 267, I find the following: "An assignee, under the bankrupt law of the United States, may sue in his own name in the State courts to enforce the rights vested

in him by the assignment in bankruptcy, and the courts of the United States have not exclusive jurisdiction of such actions."

Upon principle, it could not well be otherwise than that the assignee should have the right to bring such action in any court having the jurisdiction to hear such class of actions.* The provision of section 35 of the bankrupt act is that the assignee may bring an action to recover the possession of the property conveyed or transferred in violation of its provisions, or for its value; that is, he may maintain an action in the nature of ejectment, replevin or trover for it.

Any court of general common-law jurisdiction would, unless divested of it by some statute, have jurisdiction of such actions, and the power to hear some of such actions might be conferred upon courts of inferior jurisdiction. The first clause of section 14 contains this:

"That as soon as said assignee is appointed and qualified, the judge or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in *bankruptcy*, and *thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee.*"

As we have seen before, the property of the bankrupt specified in section 35, as well as all other property or effects of the bankrupt, passes to the assignee by virtue of the above specified conveyance. And the law which authorizes this conveyance and vests this title in the assignee, upon this subject, is the paramount law of the land. Every court of any State or Territory in this Union, in the administration of law, is bound by it. An assignee

* NOTE. — The main question in this case has been considered by many courts, and the doctrine stated in the opinion has been sustained by the weight of authority in the latest decisions. In addition to the cases cited in Bump's Bankr. (8th ed.) 324, 325, see *Dammann v. White*, 48 Cal. 452; *Otis v. Hadley*, 112 Mass. 105, and cases there cited; *Eyster v. Gaff*, 2 Col. 228, affirmed by the supreme court of the United States, 91 S. C. 521; *Goodrich v. Wilson*, 119 Mass. 429, and cases there cited; *Burbank v. Bigelow*, 92 S. C. 182. In the last case the court approves *Eyster v. Gaff*, *supra*, which held "that the bankrupt law has not deprived the State courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons."—REF.

then comes into a State or Territorial court to recover the possession of property, saying: I have the title to the same; the defendant has the possession thereof and refuses to deliver the same to me, though demand thereof has been made. It is not possible that these courts can say to the assignee, because you received your title by virtue of a United States statute, we cannot hear your cause. It should make no difference from whence his title comes. If he has the legal title, that should be sufficient, and, as we have seen, these courts must recognize this title. The title, which is vested in the assignee in bankruptcy, would be recognized by the courts of England. Mr. Story, in the Conflict of Laws, says, in § 420: "It is obvious, that the great question involved in this case was, whether an assignment, under a foreign bankrupt law, operates as a transfer of personal property in this country. It matters not in respect to the bankrupt himself, or others claiming under him, not being creditors or purchasers, whether it operates as a legal or as an equitable transfer. In either way, it will divest him of his beneficial interest. Upon this point, it is impossible not to feel that the general current of American authority is in perfect coincidence with that of England, in favor of the title of the assignees. In most of the cases in which assignments under foreign bankrupt laws have been denied to give a title against attaching creditors, it has been distinctly admitted that the assignees might maintain suits in our courts under such assignments for the property of the bankrupt. This is avowed in the most unequivocal manner in the leading cases in Pennsylvania and New York, already cited, and it is silently admitted in those in Massachusetts."

It would present a peculiar incident in jurisprudence if it should be held that an assignee in bankruptcy might bring a suit in the courts of England to recover the possession of a bankrupt's property, and yet could not have the power in our State or Territorial courts; or if it should be held, as it has in some States already been held, as we have seen, that an assignee in bankruptcy in England could sue in our State and Territorial courts, but that an assignee under the bankrupt act of the United States could not. It may also be remarked that section 35, being in the nature of a statute of frauds, if property was conveyed in this country in violation of its provisions, and transferred to England, the

courts of that country would take notice of it as being the law of the place where the contract was made.

For these reasons, I hold that an assignee may bring an action in our Territorial district courts, appealing to its ordinary jurisdiction for the possession of property conveyed to him, and that said courts will have jurisdiction to hear and determine the same. The judgment of the court below is reversed.

Judgment reversed.

DANIELS, appellant, v. ANDES INSURANCE Co., respondent.

PLEADING — *complaint upon insurance policy.* The complaint alleged substantially that defendant was a corporation; that plaintiff was owner of a certain building and goods therein of the value of \$20,000; that defendant, for a valuable consideration, insured plaintiff against loss by fire, and issued its policy, a copy of which is set forth in complaint; that the building and goods were totally destroyed by fire; that plaintiff furnished defendant with a statement and proof of his loss, and that plaintiff performed all the conditions of the policy, upon his part. Plaintiff prayed for \$5,000, the amount named in the policy. *Held*, that the complaint states facts sufficient to constitute a cause of action.

SAME — *answer to complaint upon insurance policy.* The answer to the said complaint admitted that defendant executed the policy and had not paid the sum claimed; denied that plaintiff owned the building and goods; denied that the loss exceeded \$2,000; denied that plaintiff furnished proof of the loss; denied that plaintiff performed the conditions of the policy, and alleged that one Cutter was a part owner of the property; that plaintiff made false and fraudulent statements in his application for the insurance, and that the covenants and warranties of plaintiff formed a part of the consideration for said insurance. *Held*, that the answer is sufficient, and puts in issue the material facts alleged in the complaint. *Held* also, that, under said pleadings, the plaintiff was required to prove the performance of the conditions of the contract upon his part.

EVIDENCE — *insurance policy — examination of plaintiff.* In this action to recover under said pleadings upon a policy of insurance, the following question was propounded to plaintiff, upon his direct examination: "State whether or not you complied substantially with the conditions of the policy issued to you by the Andes Insurance Company, on the 1st of April last?" He answered, "I think I did; I did." The court refused to allow defendant to cross-examine plaintiff respecting the manner in which he performed each condition of said policy. *Held*, that the question was too

general and leading, and that the only answer would be a conclusion of law. *Held*, also, that the court should have permitted said cross-examination of plaintiff by defendant.

PLEADING UNDER CIVIL PRACTICE ACT. The Civil Practice Act has abolished the rule of the common law, which construed a pleading against the pleader, and requires parties to state only the ultimate facts upon which they rely, in ordinary and concise language, and without repetition.

DEFECTIVE PLEADINGS AND VERDICT. Defects in pleadings, which are cured by the verdict, cannot be taken advantage of in this court.

CASES CRITICISED. The decisions of the New York courts upon the practice under the Code of that State are conflicting, and entitled to slight weight in interpreting the Civil Practice Act of this Territory.

RULES OF STATUTORY CONSTRUCTION. Courts construe statutes and ascertain the intention of the legislative assembly by considering every part of the act, its subject-matter, object and intent.

Appeal from Third District, Lewis and Clarke County.

THIS action was tried by a jury that returned a verdict for Daniels, and a new trial was granted by the court, WADE, J. The 68th section of the Civil Practice Act, which is referred to in the opinion, is as follows: "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part, and if such allegation be controverted, the party pleading shall establish, on the trial, the facts showing such performance."

CHUMASERO & CHADWICK, for appellant.

The insurance policy was made a part of complaint for the benefit of respondent. Appellant stated, generally, that he had duly performed all the conditions upon his part. This was sufficient, without stating the facts. Civ. Pr. Act, § 68.

If such an allegation be controverted, the party pleading must establish, on the trial, the facts showing such performance. In what manner must the defendant controvert the allegation to put the plaintiff upon proof of specific performance? This is the only question that appellant presents.

The New York statute is like our own. No proof can be offered of facts not put in issue by the pleadings. All special matter of defense must be pleaded. No special answer has been filed in this action, and the general denial of the performance of

the conditions of the insurance policy by appellant is insufficient. *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 20 Barb. 473; Com. Dig., tit. Pleader, C, 81; *Marine Ins. Co. v. Hodgson*, 6 Cranch, 206; *Hotham v. East I. Co.*, 1 Term, 638.

The denial of each allegation of the complaint must be specific. Civ. Pr. Act, § 56. Respondent should have pointed out in what particular there was a failure upon the part of appellant to perform the conditions of the insurance policy.

Every material allegation of the complaint that is not controverted by the answer shall be taken as true. Civ. Pr. Act, § 73. The meaning of "controverted" is the same in both sections (68, 73). Under the old practice it was not necessary to plead in a declaration each condition and its specific performance. Our statute requires respondent to set forth each breach of the policy that it relied upon as a defense. Respondent has not done this.

TOOLE & TOOLE, for respondent.

The representations contained in the application for the insurance policy are conditions precedent.

Section 68 of the Civil Practice Act admits of but one interpretation. 1 Van Santv. Pl. 196, 498, 499, 234, 237; *Stoddard v. Treadwell* 26 Cal. 305. The evidence shows that appellant violated the conditions of his insurance policy, in respect to the quantity of coal-oil and gunpowder kept on the premises.

SERVIS, J. The appellant sued the respondent upon a policy of insurance, alleging in substance that the defendant was a corporation duly organized under the laws of the State of Ohio; that on the 1st day of April, 1872, he was the owner of a certain frame building, situate outside the garrison at Fort Ellis, in the county of Gallatin and Territory of Montana, containing certain goods, wares, merchandise and personal property, all of the value of \$20,000, which the defendant, in consideration of the sum of \$300, insured to the plaintiff against loss or damage by fire or lightning, and issued its policy of insurance accordingly, which policy is copied into plaintiff's complaint; that on the 3d day of April, 1872, said building and contents were totally destroyed by fire; that about the first day of June thereafter, the plaintiff fur-

nished the defendant with a statement and proof of his said loss, and that he otherwise performed all the conditions of said policy on his part, and prays judgment for \$5,000, the amount named in said policy, with interest, and for costs of suit.

To this complaint the defendant demurred, on the grounds that the same did not state sufficient facts to constitute a cause of action, and that the same was ambiguous, unintelligible and uncertain, which demurrer was overruled by the court, to which the defendant then excepted, and then filed its answer, which admitted the execution of the policy and the non-payment of the amount, as claimed, and denied the ownership, by plaintiff, of the property insured; that the loss amounted to the sum of \$20,000; that plaintiff furnished proof of the loss, or that he performed or complied with the conditions of the policy on his part, and averred that one W. B. Cutter was part owner of the property in question; that the loss occasioned by said fire did not exceed over \$2,000; that plaintiff made false and fraudulent statements in his application for said insurance, and that the covenants and warranties of the plaintiff formed a part of the consideration for said insurance; and that, by reason of the premises, the defendant is not liable to plaintiff on account of such loss, and prays judgment for costs.

Upon this state of the pleadings the parties proceeded to trial to a jury. The proceedings and evidence had on the trial are fully set out in the record, including the charge of the court, motions for nonsuit and bills of exceptions. The jury returned a verdict for the plaintiff for \$5,153.87, upon which and for which the court rendered judgment for the plaintiff, and thereupon the defendant filed its motion for a new trial, alleging as grounds therefor:

First. Irregularity in the proceedings of the court, its orders and abuse of discretion, by which the defendant was prevented from having a fair trial.

Third. Insufficiency of the evidence to justify the verdict, and that the verdict was contrary to the evidence.

Fourth. Errors in law occurring at the trial, and excepted to by the defendant.

This motion for a new trial was sustained by the court, and a

new trial granted, from which the plaintiff appeals to this court, and here seeks a reversal of the same.

The record in this case discloses not only a closely contested trial, but a voluminous amount of evidence; and if this court was required to review it all, our report would necessarily be of greater length than that of the trial below. But the presentation of the case here, and the conclusion to which we have arrived, somewhat relieves us from so arduous a task, although an examination of the sufficiency of pleading under our Code necessarily extends our report of the case.

The only question presented by the counsel for the appellant, and which they claim is decisive of the correctness of the order appealed from, is, in the language of their brief, as follows: "The question, and the only question, we present for the decision of this court is: In what manner must the allegations of the plaintiff's complaint be controverted by the defendant's answer in order to put the plaintiff upon proof of specific performance? And upon the determination of this one question, we assume, depends the correctness of the ruling of the court below in granting a new trial."

This proposition assumes, that if the answer of the defendant was, in law, sufficient to put the plaintiff to proof of the specific performance of the contract on his part, that then he has failed, and that the ruling of the court below was correct.

To correctly determine this question, we must not only look to the pleading alone, but to the law regulating the same, and especially to that of our Code. The object of all pleading is, to ascertain the subject for decision. This consists in making each party state his own case, and collecting from the opposition of their statements the points in controversy.

It is common, to all systems of judicature, to require, on behalf of each contending party, before the decision of the action, a statement of his case. Out of the mode required for this statement arise the rules of pleading. These rules are different under various systems of judicature. The principles upon which they are required to be formed, how far they affect or govern the subsequent proceedings in the action, and the construction given to them, are not immutable rules of jurisprudence, but mere matters

of practice under each code of laws, and must, therefore, essentially differ.

The Montana Code, while it could not, under our Organic Act, exclude common-law *jurisdiction*, has, seemingly, not merely modified the *rules* of pleading at common law, but abandoned them, and gone still further, and by the 47th section provided, that — “All the forms of pleadings in civil actions, and the rules by which the sufficiency of the pleadings shall be determined, shall be those prescribed in this act.”

The principal rules prescribed by the Code, as to pleading, are :

1. That they shall be in ordinary language.
2. That they shall be concise, and without repetition.
3. That they shall state facts which constitute the **cause of action or defense**.
4. As to *form*, the precise *nature* of the charge or defense shall appear from the *allegations* in the pleadings.
5. As to the *substance*, facts sufficient to constitute a cause of action or defense shall be stated.

The New York Code differs, in this respect, from ours : It omitted to as expressly abolish the common-law rules of pleading ; hence the conflicting decisions of the judges of that State upon the subject of pleading, some of which have been referred to as authority in this case. Most of the judges of that State (not unlike many other good lawyers) undoubtedly preferred the common-law rules of pleading, were, in fact, unwilling to depart from them, and gratified by any contumely that could be thrown upon the Code. And a new system, under the moulding influences of such minds, could hardly receive a judicious or even fair interpretation. Single judges, having common pleas jurisdiction, to the number of thirty and upward, in different districts of the State, commenced, without much consultation, deciding, in the hurry of circuit duty, and under the baneful influence above alluded to, upon the rules of pleading under their Code, which were immediately published and went forth to the world as authority. These decisions present a mass of crude and conflicting rulings, and are entitled to but little confidence at this day. There are, indeed, as many systems of Code pleading reported in the State of New York as there are circuits therein ; therefore, in

giving construction to our Code, many of the decisions of the New York courts must be rejected, and all must be received with great caution. And we must not forget that our Code is to be construed and carried into effect according to its own terms, and containing within itself its own rules; and that any attempt to engraft the technical words, verbal criticisms, certainty of allegation, or any other part of the old system upon ours, can only be productive of confusion and mischief.

It is true, our Code manner of pleading deprives the expert common-law lawyer of many of his former tactics and apparent legal generalship, and, instead of ambuscades and surprises, so keenly relished by an astute and sharp practitioner, he must now content himself to see the Code interpose to protect suitors against both trivial faults and subtlety in pleading, and permit an investigation into the merits of every controversy where the pleadings under our Code, wherein it states a cause of action or defense in ordinary and concise language; and the rigorous rule of the old common law, which construed a pleading most unfavorable to the party pleading, was most unquestionably intended to be abolished by our Code commissioners, for, in section 78, they expressly provide that, "in the construction of a pleading, for the purpose of determining its effects, its allegations shall be *liberally* construed with a view to substantial justice between the parties." And the very next section (79) provides: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect." The Code commissioners seemed to have expressly delegated to courts more than their former powers in the construction of their Code. It was always the duty of courts in construing statutes, that reference should be had to its subject-matter, object and intent. Not only so, but the will of the law-makers is best promoted by such a construction as secures that object, and excludes every other. And the legislature will not be presumed to have intended an absurd or unjust consequence, and their intention is to be adduced from the whole of an act, and every part taken and compared together, and the words used, taken in the sense in which like words are ordinarily understood.

And, while it is true that the language of a given statute **must** govern, yet strict grammatical accuracy need not necessarily be observed, for if it will bear a construction consistent with right and justice, although not in strict accordance with the rules of grammar, the courts are not only permitted, but bound to presume the legislature intended such construction.

With this view of the law, which we have deemed applicable, not only to the question presented, but to some extent applicable to pleadings in general, we will consider the sufficiency of the pleading directly under consideration, and more especially that of the answer.

The complaint was undoubtedly framed under section 68 of the Code, and, we think, states facts sufficient to constitute a cause of action. And the demurrer thereto was correctly overruled by the court below.

As to the answer of the defendant, the appellant insists that it is insufficient, that it does not sufficiently controvert the allegations of the complaint, so as to put the plaintiff upon proof of the performance of the conditions of the policy contract upon his part; in this, that it does not *specifically* deny such material averment of the complaint, and assign the breaches on the part of the plaintiff, pointing out wherein he failed to comply with the conditions on his part, and we are referred for authority for this proposition to *N. Y. C. Ins. Co. v. N. P. Ins. Co.*, 20 Barb. 473, where the court says: "The rule is well settled, both under our former and present practice, that no proof can be offered on facts not put in issue by the pleadings."

This is certainly not a **new** principle of law, but a long and well-established principle under the old practice, and undoubtedly applicable under our practice in actions for the unconditional payment of money only, but how does that aid us in determining the *sufficiency* of a pleading and especially the one under consideration? The question is, does the answer present an issue, either of law or fact, or both? All differences among men, as to their respective rights, in relation to each other, must arise, either out of the law or out of the facts involved in the controversy; and the chief object of the rules of pleading, as well under as before the Code, is to show to the court and the parties in which of these

respects the difference exists, and generally, what is the particular point of difference ; thus to eliminate from the controversy every matter of either fact or law, in which the respective parties do not disagree, and to present for trial the precise point in which they do disagree. And here it must be observed, that the *facts* thus required to be stated are only the *ultimate* facts upon which the party relies, not those intermediate facts, which serve only as steps or as links in the chain of proofs, by which the fact relied upon is ultimately established. Now what facts do we find pleaded in the answer of the defendant ? The fact that the plaintiff was not the owner of the property destroyed by fire, and averring who was ; the fact that the insurance was made, not only in consideration of the payment of \$300, but as well for the covenants and warranties of the plaintiff in and about the conditions imposed upon him by the contract of insurance ; that the loss of plaintiff did not exceed \$2,000 ; that plaintiff did not perform the conditions on his part, and that plaintiff did not furnish a true statement and proof of his said loss. This and these constitute the denials of the complaint, and the question is, are these denials such as put in issue material facts, and are they sufficiently alleged to put the plaintiff upon proof of the averments of his complaint. As to the facts of the answer as alleged, being material, we think there can be no question ; and the only question presented by the counsel for appellant in this respect, is, as to the manner of the denial so as to form an issue as required by the 56th section of the Code, which provides, "The answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." This language of our Code, although differing somewhat from the language of other Codes relative to the manner of denials by way of answer, was not intended to stealthily engraft therein the old common-law form of denial. All that is required of the *plaintiff* is to state the facts constituting his cause of action in ordinary and concise language, without repetition. Should any thing more be required of a *defendant* in stating his defense, or should he be compelled to repeat what the plaintiff alleges in his complaint before he is permitted to deny it ; should the defendants' conscience allow him by his answer to deny each and every allegation of the

complaint, would not that be using concise language? Is not such a denial specific, definite and certain? Under such a denial could the plaintiff be taken by surprise or his substantial rights affected? Could not the court readily ascertain the subject for decision?

It is true, the answer under consideration did not make this general sweeping denial, but it did as much, if not more, it denied ownership, loss, consideration, proof of loss, and that the plaintiff did not perform; the very conditions recited in detail in the complaint, the very thing *to* which the defendant was pleading and to which he specifically referred. It is true that the answer does not enter into an *argument* in detail, whereby to exhibit to the plaintiff specifically wherein he failed, a fact presumptively within the knowledge of the plaintiff, but not so with the defendant. Upon what principle of right, justice, or equality of right, is the defendant required to deny in detail, that which is not specifically asserted in detail? If such were the law, it would in effect be giving to the plaintiff an unjust advantage over the defendant.

We think such was never intended by the Code, and is not the law.

The plaintiff, however, insists that the conditions of the policy, which were copied into and formed a part of the plaintiff's complaint, were thus inserted for the benefit of the defendant, and must be taken advantage of, if at all, by answer. Concede this proposition, however doubtful, and what follows? Simply that the defendant must answer, but as to the *character* of the answer, we are not enlightened by the authority referred to (20 Barb. 473), and we are, therefore, remitted to the general principles already discussed. And we might well here inquire if the only object in inserting the conditions of the policy in the complaint was for the benefit of the defendant, how could the plaintiff recover without inserting them in some manner? Indeed, *quere*, how could he recover, with *proof* of all necessary averments, had no answer been filed?

Looking, then, to the pleading in question, and to that section of the Code which prescribes the rules by which the sufficiency of pleadings shall be determined, and finding that it is concise: in ordinary language, that the precise nature of the defense

appears therefrom, we are, therefore, of the opinion it states facts sufficient to constitute a defense, and sufficiently specific to put the plaintiff to proof of the conditions of the contract on his part. But we suggest that this question could, as it should, have been tested in the court below, by motion or demurrer, and that the objection comes too late after verdict, as seems now to be the settled rule by the courts that defects in pleadings are cured by verdict in the same manner and to the same extent as before the Code. See *Decker v. Mathews*, 2 Kern. 321; *Brown v. Harmon*, 21 Barb. 508; *Clark v. Dales*, 20 id. 42. And our codifiers, in seeming recognition of this principle, and to afford relief from any injustice that might be done thereby, provided in section 76 that if a judgment be rendered against a party, through his mistake, inadvertence, surprise or excusable neglect, the court, or a judge at chambers, might *relieve* him therefrom.

But all this does not finally dispose of the question presented by the record in this case; having determined the sufficiency of the pleadings, does not necessarily determine the question as to whether the court erred in sustaining the motion for a new trial. To do that we must necessarily examine the grounds therefor, and, to some extent, the proceedings and proof on trial, which we have done sufficiently to satisfy us that, in the trial, there was error, the full extent of which, as assigned, we have not examined. But we do find that the court erred in permitting the following question to be propounded to the plaintiff, namely:

“State whether or not you complied substantially with the conditions of the policy issued to you by the Andes Insurance Company, on the 1st of April last?” This, we think, was too general, too leading, especially to a plaintiff, and that the answer to which was, and only could be, a conclusion of law, which the jury alone, under *facts* stated and the law to be given by the court, were the proper legal judges. And after having in this manner, and this manner alone, established the performance on his part, by an affirmative answer (“I think I did; I did”), the defendant then sought to cross-examine the witness specifically how and in what manner he thus specifically performed the conditions of the contract, or policy, on his part, keeping in view and having reference to the express conditions therein to be by him performed.

To this the counsel for the plaintiff objected — and the court sustained the objection — on the ground, as we assume, that these alleged breaches were not specifically denied in the answer. In this, we think, the court below erred, and, upon reflection, on the hearing of the motion for a new trial, saw the error it had committed, sustained the motion and granted a new trial. In this, we think, the court did not err.

The judgment of the court below in granting a new trial is, therefore, affirmed, and the cause remanded to the court below for further proceedings.

Judgment affirmed.

TERRITORY, appellant, v. ASHBY, respondent.

ALLEGATION OF CRIME IN INDICTMENT. Under the Criminal Practice Act of the Territory, an indictment is sufficient which alleges, clearly, a crime and notifies the accused of the act which is complained of; and the highest degree of certainty is not required.

DESCRIPTION OF ALLEY IN INDICTMENT FOR OBSTRUCTING HIGHWAY. An indictment contains a sufficient description of a public alley, which alleges that there was, in Helena, an ancient highway, known as — alley, in a certain block leading from thence to Rodney street, and that the accused erected a fence across said alley, near the west end of said Rodney street, and continued the same a certain time.

PROSECUTION AFTER REPEAL OF STATUTE. A party cannot be convicted of an offense after the statute defining it has been repealed, and there is no legislation saving pending prosecutions.

OBSTRUCTION OF HIGHWAYS — joinder of offenses. An indictment, which alleges that a party obstructed a public alley by the erection of a fence upon a certain date, and continued to maintain the same thereafter, does not state two offenses that cannot be joined.

ALLEGATION OF TIME IN INDICTMENT UNDER DIFFERENT STATUTES. An indictment, which alleges that the accused obstructed a highway from June 21, 1872, to November 2, 1872, is not invalidated by the repeal of the old law defining the offense and the passage of a new law relating thereto on August 1, 1872

Appeal from Third District, Lewis and Clarke County.

THE court, WADE, J., sustained Ashby's motion to quash the indictment, and the Territory appealed.

J. J. WILLIAMS, District Attorney, Third District, for appellant.

The offense is couched in the language of the statute. The offense of erecting a nuisance is the same as that of continuing it. Acts 1865, 209, § 129; Cod. Sts. 303, § 147; 544, §§ 2, 3.

Every continuance of a nuisance is a new offense under the statute. A series of acts, which separately or together constitute an offense, may be charged in a single count. All of the acts constitute no more of an offense than one of them. *People v. Frank*, 28 Cal. 513.

W. F. SANDERS, for respondent.

The description of the ancient common highway in the indictment is indefinite and insufficient. There is no description which the defendant could avail himself of as a protection against further prosecutions, on conviction or acquittal.

SERVIS, J. The defendant was indicted, at the October term of Lewis and Clarke county district court, A. D. 1872, charged with the commission and continuance of a nuisance.

The indictment charges: "That, at the time of committing the nuisance hereinafter mentioned, there was and yet is a certain ancient common highway in the town of Helena, in the county of Lewis and Clarke, in the Territory of Montana, known as ——— alley, in block No. 28 of said Helena, leading from and through said block No. 28 of said Helena, into, through and over a certain other public highway, called Rodney street, for all of the good people of said Territory to go, return, pass and repass at pleasure. And that on the 21st day of June, A. D. 1872, one Sherley Ashby, late of said county and Territory, with force and arms, at a certain place in said town of Helena, contiguous to and on the west side of said public highway, called Rodney street, and across said alley known as ——— alley, in said block No. 28 aforesaid, leading through said block No. 28 into said public highway, called Rodney street, said alley then and there being a public highway as aforesaid, unlawfully and injuriously did erect and cause to be erected a certain wooden fence of the length of 13 feet and of the height of 4 feet, upon and across said public highway known as ——— alley in block No. 28 aforesaid, and that the

said Sherley Ashby the wooden fence erected and made as aforesaid, from the said 21st day of June, A. D. 1872, until the finding of this indictment, with force and arms at said place where said wooden fence was so erected, unlawfully and injuriously did continue to keep and maintain, and yet doth continue, by which the common highway last aforesaid was, during all of said time, obstructed, injured and stopped up so that the same became and was impassable, to the great damage and common nuisance of the people, contrary to the statute, and against the peace and dignity of the Territory."

To this indictment, the defendant, without arrest or plea, appeared by counsel, and moved to quash the same, for the following reasons:

First. That said pretended highway is not a common, ancient highway, nor is there in said Helena such ancient, common highway.

Second. Because said highway is not described with such exactness as to enable defendant to ascertain the particular alley for the obstruction of which he is indicted, nor would a conviction or acquittal constitute a bar to a second prosecution for obstructing this alley in said block 28.

Third. Because there was no statute in force June 21, 1872, demanding penalties for such obstruction of an alley or highway, which has not been repealed.

Fourth. Because two separate offenses are charged, to wit: Obstructing an alley, and continuing the same.

Fifth. Because said statutes, under which the indictment is found, did not take effect until August 1, 1872.

Sixth. Because offenses committed before August 1, 1872, are punishable under our statute, then repealed as to all offenses thereafter committed, and because the offenses charged in said indictment are not punishable in the same penalty, and because two separate and distinct statutes cover the offense charged, one of which statutes only was in force at any time, covered by the allegations of the indictment.

Seventh. Because two distinct and independent offenses are charged, and with different penalties, so that, upon a verdict of guilty, the court could not fix the penalty which the law provides.

Eighth. Because of the other defects appearing from said indictment.

This motion, the court, on hearing, sustained, and, without further judgment or order, as shown by the record, the Territory appealed to this court. And we are, therefore, called upon to determine whether the court, in sustaining this motion, erred. To do this we must necessarily examine, not only the indictment, but the several grounds contained in the motion to quash the same.

As to the first grounds of the motion, we think they were not well taken. It could only be determined on trial upon a plea of not guilty, or motion in arrest of judgment after trial and conviction.

The second ground of the motion goes to the sufficiency of the indictment.

It is a well-established rule of criminal law, based upon sound principles, that every indictment should contain a complete description of the offense charged; that it should set forth the facts constituting the crime, so that the accused may have notice of what he is to meet, and so that the court, applying the facts to the law, may see whether a crime has been committed. This is necessary, also, in order that the court may know, upon conviction, what crime has been committed. But the highest degree of certainty is not required; certainty to a common intent is sufficient in the statement of an offense; and no rule ought to prevail which would serve only to shield the guilty instead of protecting the innocent; unreasonable strictness ought not, and is not, under our Criminal Code, required; and where the indictment clearly charges a crime, and fairly advises the defendant what act of his is the subject of complaint, the principal object of pleading is attained.

It is insisted in argument, that this indictment is insufficient as to its description of the highway, and the alley alleged to have been obstructed, and that no termini of the alley or highway is described, etc. Let us examine the averments of the indictment in this respect. And a true paraphrase thereof is: That, at and during the time alleged, there was an ancient highway in the town of Helena, known as alley, in block number 28 of said

town, which led from thence to and over a highway called Rodney street. That the defendant erected a fence across said alley contiguous to and near the west end of said Rodney street, and kept and continued the same across said alley from the 2d day of June, A. D. 1872, and until the 2d day of August, A. D. 1872.

The statute relative to this offense provides: If any person shall obstruct or injure, or cause to be obstructed or injured, any public road or highway, or common street, or alley, of any town, city or village, etc., or shall continue such obstruction, so as to render the same inconvenient or dangerous to pass, etc., etc., he shall, upon conviction, be fined, etc., and the court may abate such nuisance. Cod. Stats. 303, § 147.

By this statute it is made an offense to obstruct an alley in a town. The indictment charges the defendant with obstructing an alley in the town of Helena, and that it is and was a public alley—a public highway. It is true, it does not give the width nor termini of the alley; neither do we think it necessary. The description given in the indictment is amply sufficient to so apprise an officer charged with the duty of abating such nuisance to act understandingly, as well as to apprise the accused, without any unreasonable difficulty, of the place intended; and if there be any such difficulty, advantage thereof can be taken, under our practice, by demurrer. This doctrine, we think, is well sustained in *Archbold's Criminal Practice and Pleadings*, and in *Commonwealth v. Hall*, 15 Mass. 240. We are, therefore, of the opinion that the indictment in this case is sufficiently definite in its description of the offense charged, and that a verdict of acquittal or conviction under it would be a bar to a future prosecution, especially so as, by the 224th section of our Criminal Code, a plea of former conviction or acquittal will be held good, not only for the offense charged, but for any offense necessarily *included* in the indictment, of which the defendant might have been convicted.

The more difficult questions to be determined arise out of the remaining grounds of the motion to quash the indictment, to a correct determination of which we must examine the various statutes of this Territory, defining and punishing this offense. The statutes of 1865 and of 1872 upon this subject were exactly alike.

The latter arose from the codification of the laws of the Territory, and it is but reasonable to presume that this latter statute was not intended to form a part of the codified criminal laws. It was, to say the least, no amendment to, or modification of, the former law upon the same subject. But be this as it may, we find the law upon our statute books, and being called upon to adjudicate upon it, must do so as our best judgment shall dictate.

The law of 1872, by its terms, took effect August 1, 1872, and it also provided as follows (§ 192): "All acts and parts of acts conflicting herewith, as to crimes committed after this act shall go into effect, are hereby repealed. All laws heretofore existing upon the subject of crimes and punishments shall remain in full force and effect as to all crimes committed before this act goes into effect."

That this law, no matter by what means it has crept into and upon our statute, is undoubtedly, at least so far as it *conflicts* with the law of 1865, a repeal of that law, as found in section 129 of the Bannack statute of 1865. We believe the doctrine to have been universally established, both in England and in the United States, that when a criminal statute is repealed, and there is no provision in the repealing statute saving offenses or pending prosecutions under it, no conviction, after such repeal, can be legally had under such statute; and the statute repealed must be considered except as to transactions passed and closed, as if it had never existed. And this doctrine, so long and universally established, should not be destroyed by indulging in conjectures as to the intent of the legislature.

Now let us see the law of 1872 repealed, what? "*All acts and parts of acts conflicting herewith.*" Wherein, we would inquire, is section 129 of the law of 1865 in *conflict* with section 147 of the law of 1872, and the answer is, nowhere; then is the old law repealed? The fact that our legislature does exactly what a former legislature has done, does not thereby necessarily impair the validity of the same act of the former legislature, or repeal it, unless it clearly appears that such subsequent legislation was intended as a revision of and substitute for the former legislation.

But suppose such in fact was the intention of the legislature of

1872. How then stood the law in question as to the charge in the indictment? The old law was, without doubt, in force until August 1st, 1872. The new law was in force (if at all) from and after August 1st, 1872. The charge in the indictment covered this whole time. Then was there not an offense charged under one or the other or both of the acts? It is quite clear that there was. But it is insisted that, although there were two statutes in force during the time charged in the indictment, that the court could not, upon conviction, pronounce judgment according to the right of the case. Why not? It is quite clear, that the defendant could have been convicted if the proof would so justify, from June 2d, 1872, until August 2d, 1872, for that is expressly provided for in the law of 1872. And the averment in the indictment that the nuisance was continued beyond the time of the life of the statute, would not thereby invalidate the indictment. It might affect the extent of the proof. And on the other hand, suppose the old law to have been absolutely repealed without any saving clause as to acts committed or actions pending. Why could not the defendant be convicted or acquitted from the time the new law took effect until November 2d, 1872, when the indictment was found? The averment in the indictment that the offense was committed before the law took effect, and so continued from that time forward, during which there was a law punishing the offense, does not invalidate the indictment nor defeat an investigation during the time the law in fact was in force.

The fact that the indictment avers, that *on* the 2d day of June, 1872, the defendant erected the fence (nuisance) and thereafter *continued to maintain* the same, is not under our statute such a statement of two separate offenses as cannot be joined in one count. This proposition is not only sustained upon principle but upon authority. *People v. Frank*, 28 Cal. 513.

We are, therefore, of the opinion that the motion to quash the indictment was not well taken, and that the court erred in sustaining the same. The judgment of the court below is, therefore reversed and the cause remanded for further proceeding.

Exceptions sustained.

WADE, C. J. I concur in the foregoing decision, with the following statement:

At the time the decision was rendered below, the law of 1872, prescribing the penalty in cases of nuisance, as published in the Codified Statutes, provided that the penalty, in all cases, should be a fine of \$1,000, while the statute of 1865 provided a penalty in any sum from \$1 to \$1,000. The law of 1872 took effect the 1st of August of that year, while that of 1865 remained in force up to that time. The offense charged in the indictment is alleged to have been committed continuously from the 21st day of June, 1872, to the first Monday of November of that year.

Upon a verdict of guilty on such an indictment, with the statutes in the condition as stated, it would have been utterly impossible for the court to have rendered any judgment whatever, unless it undertook arbitrarily to determine which offense the defendant was guilty of, and to say that the jury found the defendant guilty under the old statute in force up to the 1st of August, or under the new one, in force after that time up to the time of finding the indictment. And for this reason the demurrer was sustained. Upon further investigation it is ascertained that the statute of 1872, as published, was erroneous, and that the act of 1872, as it was enacted by the legislature and approved, was and is an exact copy of the statute of 1865, and hence the only reason for the decision below fails, and for these reasons I concur in the decision as herein rendered.

TERRITORY ex rel. **BLAKE**, respondent, *v.* **VIRGINIA ROAD CO.**,
appellant.

SUFFICIENCY OF COMPLAINT. This court can inquire at any time into the sufficiency of the complaint to support the judgment which has been entered thereon.

COMPLAINT IN ACTIONS FOR USURPATION OF A FRANCHISE. In this action the complaint alleged that defendant, for more than three years, used certain franchises, which were specified; that defendant, during this time, usurped said franchises; that defendant claims the right to use said franchises, under an act of the legislative assembly of the Territory, entitled "An act to incorporate the Virginia City and Summit City Wagon

Road Company," approved January 27, 1865; that said right of defendant was without warrant, grant or charter, and that defendant had forfeited said right by its failure to comply with said act, and maintain and keep in repair its toll-road. *Held*, that this complaint is sufficient at common law and under the Civil Practice Act.

SAME — allegation of incorporation. The sixty-first section of the Civil Practice Act, approved December 23, 1867, provided that "In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof." *Held*, that said act of incorporation was made a part of said complaint by said reference, and the court must find that defendant is a corporation. *Held*, also, that said complaint should not contain any other allegation that defendant is a corporation.

STATUTORY REMEDY FOR USURPATION — private remedy. The eighth section of said act of incorporation gives persons the right to make complaints of the bad condition of the defendant's road, before a justice of the peace, and prescribes fines and other penalties against defendant for a failure to keep its road in good repair. *Held*, that this remedy does not modify the common-law and statutory remedy for the usurpation of a franchise by defendant. *Held*, also, that defendant subjects its franchise to forfeiture, upon its failure to keep its road in good condition.

GRANTS OF FRANCHISES. Grants by the legislative assembly, which confer franchises, are contracts between the sovereign power of the Territory and private citizens, upon certain conditions precedent, which must be complied with.

PLEADING IN QUO WARRANTO AND ACTIONS FOR USURPATION. The fifth chapter of the eighth title of the Civil Practice Act, approved December 23, 1867, which provides for actions for the usurpation of a franchise, is the same in effect as the common law relating to informations in the nature of *quo warranto*; and the sufficiency of a complaint for the usurpation of a franchise is determined by the rules of the common law.

COMMON LAW IN FORCE. The common-law remedies remain in force in the Territory, if they have not been abolished by the statutes.

QUO WARRANTO — redress of public wrongs. The first section of the Civil Practice Act, approved December 23, 1867, which provides that there shall be "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," does not apply to informations in the nature of *quo warranto*, which are solely employed to enforce or protect public rights, and redress or prevent public wrongs.

Appeal from First District, Madison County.

THIS action was tried by a jury, and the judgment was rendered by SERVIS, J.

The act of incorporation of appellant is printed in Sts. 1865, 604. The provisions of the Civil Practice Act, approved December
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23, 1867, which are referred to in the opinion, are contained in the Civil Practice Act, approved January 12, 1872.

J. G. SPRATT, TOOLE & TOOLE and PAGE & COLEMAN, for appellant.

The complaint does not state a cause of action. The complaint raises only one question, the existence of appellant as a corporation. It says the corporation has had no existence for three years, and prays that it may be brought into court and excluded from the use of privileges, which have not been used over three years. Respondent has mistaken his remedy. The action should be against the representatives of the dead corporation.

The persons assuming to be the corporation, when none exists, must be sued and not the corporate name. Dill. on Corp., § 719; *King v. Cusacke*, 2 Roll. 113; *People v. Richardson*, 4 Cow. 109. The complaint is in conflict with those authorities. *Rex v. Saunders*, 3 East, 119.

An information in the nature of *quo warranto* will not lie against a *de facto* corporation in its assumed corporate name. *State v. Cincinnati G. Co.*, 18 Ohio St. 262; A. & A. on Corp. 865.

The complaint is defective in not alleging a total nonuser, and that the road was out of repair when the suit was brought. *People v. Bank of Niagara*, 6 Cow. 210; *People v. Bank of Hudson*, id. 218; *Commonwealth v. Ins. Co.*, 5 Mass. 230.

This proceeding is governed by our Civil Practice Act, the same as other civil actions.

The eighth section of the charter points out the remedy for acts of nonuser, and *quo warranto* to forfeit the corporation is not authorized. A. & A. on Corp., § 710.

The evidence does not justify the verdict. The allegations of the complaint are confined to nonfeasance. A single act of nonfeasance will not work a forfeiture of the charter, unless it is proved to be willful. *People v. B. & R. Turnpike*, 23 Wend. 222; *Bank Com. v. Bank of Buffalo*, 6 Paige, 497.

If the nonfeasance is not continued up to the commencement of the proceeding, or has ceased before that time, or is not an existing danger to the community, it is not a good cause of forfeit-

ure. *State v. Essex Bank*, 8 Vt. 489; *State v. Manchester Bank*, 13 Sm. & Mar. 569; *Carey v. Greene*, 7 Ga. 79; *A. & A. on Corp.*, § 775.

The testimony shows that the road in controversy was in good repair at the time this action was commenced and several months prior thereto. There was no evidence of any willful neglect on the part of appellant.

The proceeding in the nature of an action of *quo warranto* has ceased to be criminal. The common-law practice relating thereto has been repealed by our Code. 2 Bouv. L. Dict. 405; 1 Estee's Pl. 22, 207; Civ. Pr. Act, §§ 1, 47, 48, 49, 359.

S. WORD and H. N. BLAKE, District Attorney, First District, for respondent.

This action is brought under the fifth chapter of the Civil Practice Act. Stats. 1867, 197, §§ 310-316.

The complaint states facts sufficient to constitute a cause of action. *People v. Richardson*, 4 Cow. 106, 111; *People v. Utica Ins. Co.*, 15 Johns. 362; *People v. Kingston M. T. R. Co.*, 23 Wend. 194; *People v. Bristol & R. T. Co.*, id. 221; *People v. Hillsdale & C. T. Co.*, id. 253; *Thompson v. People*, id. 537, 703; *Commonwealth v. Tenth M. T. Co.*, 5 Cush. 509; *A. & A. on Corp.*, §§ 756, 776; *People v. Bank of Niagara*, 6 Cow. 196.

The long-continued neglect of appellant to repair the road was a violation of the conditions of the charter and a cause of forfeiture. *A. & A. on Corp.*, § 776; *People v. Hillsdale & C. T. Co.*, 23 Wend. 253.

Appellant insists that this is an action against persons assuming to be a corporation. It is a proceeding against a corporation for usurping certain franchises, and must be brought against the corporation by its name. Charter of Appellant; *A. & A. on Corp.*, §§ 643, 645; *People v. Richardson*, 4 Cow. 111.

The implied condition of a grant of incorporation is, that the grantees shall act up to the design and end for which they were incorporated. *A. & A. on Corp.*, § 774; *Terrett v. Taylor*, 9 Cranch, 51; *Dartmouth College v. Woodward*, 4 Wheat. 658; *People v. Manhattan Co.*, 9 Wend. 351.

The proceedings before the justice of the peace, specified in the eighth section of the charter, afford a cumulative remedy. The proceeding by information under the Civil Practice Act is not affected by this section. Cases in 23 Wend., *supra*.

The most that appellant can claim is that the evidence is conflicting. This court cannot disturb the verdict on this ground. *Ming v. Truett*, 1 Mon. 322; *Kinna v. Horn*, id. 597.

WADE, C. J. This is an action brought by the district attorney of the first district, upon information in the nature of a *quo warranto*, on behalf of the people of the Territory, against the defendant, to compel the defendant to show by what authority it claims to exercise the privileges and franchises of a corporation, and for judgment of forfeiture and ouster. There was a demurrer to the information or complaint, which was sustained in part and in part overruled, to which rulings of the court no exceptions were taken; the plaintiff not amending the pleading but abiding the same, and the defendant was ruled to answer. An issue was formed, trial had, verdict and judgment for plaintiff and appeal to this court.

The appellant now attacks the information or complaint for the reason that it does not state a cause of action; and no exceptions having been taken to the rulings of the court below upon the demurrer, and no question saved as to the sufficiency of the complaint, the inquiry is presented, whether or not the question can be raised in this court for the first time. No exceptions having been saved to the decision upon the demurrer, the complaint stands here precisely the same as if no demurrer had been filed; and we are called upon to determine whether this court can inquire as to the sufficiency of the complaint, the question not having been raised in the court below.

It is well settled that the averments of a pleading and the proofs must correspond, and it therefore follows that perfect proof cannot aid an imperfect averment, and a perfect averment is unavailing if supported by imperfect proof. If, in order to lay the foundation for recovery, the proof must go beyond the complaint, then the complaint is defective, and will not support the judgment. A judgment is the final determination of the rights of the

parties, and must be supported by the pleadings and proofs. If there is a material defect or infirmity in either, the judgment cannot be sustained; and if the defect is in the pleading, the question can be raised at any time, either before or after judgment, or after appeal to this court. The lower courts have not jurisdiction to render judgment in the absence of a cause of action, and it would be equally erroneous for this court to affirm such a judgment. If there is a judgment for the plaintiff, and the complaint shows upon its face no cause of action, the appellate court will reverse the judgment. A judgment by default cannot be rendered upon a bad complaint, and if it was so rendered, upon appeal to this court it would be reversed, for the reason that here, as well as in every stage of the proceeding, the complaint must support the judgment. A bad complaint will not sustain a good judgment, and the question whether or not there is a cause of action alleged can be raised for the first time in this court, for here, as in every other court, the judgment must fail if the foundation upon which it stands is materially defective. *Barron v. Frink*, 30 Cal. 486; *Hunt v. San Francisco*, 11 id. 258; 1 Chitty's Pl. 411; *Barnes v. Hurd*, 11 Mass. 59; *Green v. Palmer*, 15 Cal. 411; *Abbe v. Marr*, 14 id. 211; *Willson v. Cleveland*, 30 id. 192.

The complaint substantially avers that the defendant, for the period of more than three years prior to the commencement of this action, had used, and still does use, the following liberties, privileges and franchises, to wit: That of being a body politic and corporate, by the name and style of the Virginia City and Summit City Wagon Road Company, and by such name to be capable of making contracts; to sue and be sued; to implead and be impleaded in courts of law and equity in this Territory; to have and use a common seal; to erect a toll-house and toll-gate on said road; to employ a toll-keeper to demand and receive tolls from all persons, wagons, horses, etc., passing over the same; to purchase and hold real and personal property, and sell and convey the same, and claims the franchise to maintain said road for the term of twelve years from and after January 27, 1865, and to collect toll on the same; that all said privileges, liberties and franchises the defendant, during all the time aforesaid, has usurped,

and still does usurp, upon the said plaintiff; that said defendant claims to enjoy and use said franchises, liberties and privileges under and by virtue of an act of the legislative assembly of this Territory, entitled "An act to incorporate the Virginia City and Summit City Wagon Road Company," approved January 27, 1865; that said claims of defendant are without warrant, grant or charter; that during the months of November and December, 1866, and January, February, March, April and May, 1867, said defendant did negligently fail to improve, complete and maintain said road, and keep the same in repair; that during said months the defendant abandoned said road, and the privileges, franchises and liberties, if any, acquired under and by virtue of said act of the legislative assembly; that said defendant negligently permitted said road to fall into such a state that it was rendered dangerous and inconvenient to travelers passing over the same; and then follow averments of like character for the years 1868, 1869, 1870 and 1871.

The answer is a specific denial of the allegations of the complaint, except it admits that the defendant claims to use and enjoy said privileges, franchises and liberties under and by virtue of the act of the legislative assembly mentioned in the complaint, and denies that the same is without warrant, grant or charter.

It is contended upon behalf of the appellant that this is a civil action, and made so by the Practice Act; that the common-law remedy, by information in the nature of *quo warranto*, is by said act abolished, and that the complaint should contain all the averments necessary to constitute a good complaint in a civil action under the Code. It is also contended that this complaint is fatally deficient, because it does not aver that appellant is a corporation; that its allegations are based upon the hypothesis that defendant is not a body politic and corporate, and that it raises only the question of its existence as a corporation; that the claim of the defendant to exercise the rights, privileges and franchises pertaining to the road by the direct terms of the complaint, are without warrant, grant or charter, and that, having none of the attributes of a corporation, at the date of bringing this suit, yet it is charged with various acts of usurpation, omission and commission in its corporate capacity. And it is further contended

that, if the defendant had neither warrant, grant or charter at the date of bringing this action, that is, if it was not a corporation, and had usurped the authority it pretended to exercise, then it could have no *status* in or out of court; that it could neither sue or be sued, and that, if the defendant was not a corporate body, and existed with neither warrant, grant or charter, it was impossible for it to commit any act of usurpation, omission or commission, and hence that the plaintiff has brought this action against an artificial being that did not at the time exist, and prays a judgment of ouster against a nonentity.

In order to solve the questions surrounding this case, it will be first necessary to ascertain what effect the adoption of the Civil Practice Act of this Territory had upon the common-law remedy for usurpations of public offices and franchises. The ancient mode of proceeding was by writ of *quo warranto*, and this old writ is the foundation of the more modern proceeding by information in the nature of *quo warranto*. During the reign of Queen Anne, a statute was passed upon the subject of informations, in the nature of *quo warranto*, in cases of usurpations or intrusions into public offices or franchises, and this statute forms the basis of the remedy in England and the United States at the present day in cases of this character, except where the proceedings have been established, modified or changed by statute.

Did the adoption of our Civil Practice Act by the legislative assembly of this Territory abrogate or abolish the common-law remedy upon this subject? The appellant contends for the affirmative of this proposition, and also that the Practice Act established a civil action for all cases of this kind, and that the complaint in this case, when tested as a complaint in a civil action under the Code, is defective, and hence that the judgment below should be reversed.

The Practice Act, in force at the commencement of this action, provides, section 1: That "there shall be, in this Territory, but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs." It also provides, section 310: "An action may be brought by the district attorney, in the name of the people of this Territory, upon his own information, or upon the complaint of a private

party, against any person who usurps, intrudes into, or unlawfully holds, or exercises any public office, civil or military, or any franchise within his district in the Territory." This, and the following six sections, contain all the provisions of our statute in relation to usurpations, intrusions into or unlawfully holding public offices or franchises; and this statute, to all intents and purposes, is but a re-enactment of the common law upon the same subject, and in the absence of any such statute by virtue of the common law, in this Territory, the remedy for this character of cases would still have been perfect and complete. And even if our statute had provided a new remedy, and a new mode and form of proceeding in this character of cases, still the common-law remedy would have remained in full force, unless the statute, in direct terms, abolished it, and this by virtue of a very old and a very sound rule of interpretation, that "a statute in the affirmative, without negative words, does not take away the common law;" and, recognizing this principle, the legislature of New York State, when they adopted a Code of Civil Procedure, directly, and in unmistakable terms, abolished the common-law remedy of *quo warranto*, while the legislature of Ohio, when adopting a Code for that State, expressly saved it.

Our law being but the common-law remedy reduced to the form of a statute, let us examine the question as to how and wherein our Civil Practice Act has affected the pleadings and mode of proceedings in this action. Informations in the nature of *quo warranto* are always of a public character, wherein the people, the State or the Commonwealth are interested, and this form of action and proceeding can never be resorted to to redress a private wrong or for the enforcement of a private right. And if the action which the district attorney, by virtue of section 310, is authorized to bring on behalf of the people is a civil action, it is made so by virtue of the first section of the act, but this first section only provides a civil action for the enforcement and protection of *private* rights and redress for *private* wrongs; and if informations in the nature of *quo warranto* do not and cannot, in any manner, affect *private* rights and wrongs, then this section of the Practice Act has no control whatever over this action or proceeding.

It has long been settled, indeed the proposition was never disputed, that proceedings upon information in the nature of *quo warranto* to inquire by what authority a person holds an office or a franchise, were and are *alone* applicable to public offices and franchises where the general *public* are interested, and hence the action is always brought in the name of the people, and is never used or applied to a *private* right, office or franchise. The remedy of *quo warranto* cannot now and never could be used to call in question a private right, as if A claims the right to get water at the spring of B, B cannot question the right by *quo warranto* for the reason that the public has no interest whatever in the controversy. And so if I have an easement in my neighbor's farm whereby I have the right of way over and across the same for certain purposes, my right cannot be tried by *quo warranto* for a like reason. And if A claims to be the chief officer of a partnership wherein the people have no public interest, or of an unincorporated company, a mere private affair, an information in the nature of a *quo warranto* is not the remedy to question his claim. It is only in cases where the people have a general and a common interest that this remedy can be resorted to, and hence, in all the cases in the books, the people are plaintiff, and it would be a strange proceeding, indeed, if the people could bring an action to protect the *private* rights of a person or to redress his *private* wrongs.

Section 310 provides that the district attorney may bring an action not for any private individual, or for a private purpose, but in the name of the people, against any person who usurps, intrudes into or unlawfully holds any public office or franchise within his district. And the action is authorized in the name of the people simply because the usurpation or intrusion is a public matter in which all the people are interested, and because the people are the real party in interest, and section 316 provides that if the defendant is found guilty of such usurpation or intrusion, he may be fined in any sum not exceeding \$5,000, which fine shall be paid into the Territorial treasury; so the action is in the nature of a criminal one, brought by the people for a violation of their rights and privileges, and the punishment is forfeiture and

fine, which latter is paid to the Territorial treasury for the benefit of the people who have been wronged.

We, therefore, hold that section 1 of the Practice Act, wherein is provided a civil action for the enforcement of private rights, and the redress of private wrongs, cannot apply to informations in the nature of *quo warranto*, which are purely of a public character, and which are resorted to to redress public wrongs, and to enforce public rights, with any better propriety than it could apply to proceedings upon indictments wherein the people seek to punish offenders against the criminal laws.

And even if our statute, upon the subject of usurpations and intrusions into public offices and franchises, was not a re-enactment of the common law upon the same subject, and if the statute did provide a new remedy, and a new form of proceeding, which it does not, still the statute does not pretend to abolish the common-law remedy, and, therefore, leaves it in full force, and if we have two remedies, we may test and try the sufficiency of this complaint by either, and if the information or complaint in this action is good at common law, it is sufficient for all the purposes of this case, and, as we hold that the first section of the Practice Act does not apply to this form of action, we must measure the information herein by the rules and principles of the common law.

In proceedings upon information in the nature of *quo warranto*, the rule of pleading is thus laid down in *Thompson v. The People*, 23 Wend. 571: "Where the information questions a present right of any defendants to have or use any corporate rights or franchises, those defendants must in their plea set out the matter specially as it forms their defense, and upon that plea the attorney-general takes issue (unless he chooses to allege by way of replication some new matter), and is not required to specify the charges upon which he relies as matters of forfeiture. All such new matter alleged in the replication, or otherwise by the attorney-general, is in fact a new information, and must be pleaded to by the defendants until an issue is formed." And this course of pleading was pursued in the celebrated *quo warranto* case of *The City of London*, 8 Howell's State Trials, 1050, and has been followed as a form since that time. In that case the attor-

ney-general, by information in the nature of *quo warranto*, charged that the mayor, etc., of the city claimed and used without lawful authority: 1. To be a body corporate; 2. To elect sheriffs; 3. To be justices, and hold sessions, all which liberties and franchises they usurped. To this information the defendants pleaded their charter, etc., and the attorney-general replied that they were not a corporation, whereby issues were joined for the jury. Justice BLACKSTONE, commenting upon this case, says the proceedings in strictness of law were sufficiently regular.

In a note by the learned reporter, to the case of *People v. Richardson*, 4 Cow. 106, a form for an information is given, which strictly follows the precedent of the case against the *City of London*, and it is there stated that this is the form, whether the information be brought for an usurpation without any original title, or for a *subsequent forfeiture when the original title is not disputed*.

In the case of *People v. Kingstown & M. T. R. Co.*, 23 Wend. 194, the action was an information in the nature of a *quo warranto*. The information charged the defendant with *usurping* the liberties, privileges and franchises of being a body politic and corporate by the name of the Kingstown & Middletown Turnpike Road Company, and by that name to construct and maintain a turnpike road within certain bounds, specifying the same, and to erect and maintain gates upon such road, and to levy and collect tolls from all persons using the same; all which liberties and privileges were charged to have been *usurped*. To this information the defendants pleaded the act of the legislature whereby they were erected a body corporate, and were authorized to construct the turnpike road, etc., described in the information, and the correctness of this information was not called in question.

In the case of *People v. Bank of Niagara*, 6 Cow. 196, the information is set out in full in the report of the case, and substantially charges that the President, Directors and Company of the Bank of Niagara, at Buffalo, in the county of Erie, for the space of six months now last past and upward, have, and still do use without any warrant, grant or charter, the following liberties and franchises, to wit: That of being a body politic and corporate in law, fact and name, by the name of the President, Directors and

Company of the Bank of Niagara, and by the same name to plead and be impleaded, answer and be answered unto, etc., all which said liberties and franchises the President, etc., aforesaid, during all the time aforesaid, have *usurped*, and still do usurp, upon the said people. The defendants in their plea set forth the act of the legislature by which they were incorporated into a banking company, to which there was a replication and rejoinder. SAVAGE, C. J., delivered the opinion of the court, and, after stating the pleadings, said: "The first question respects the sufficiency of the information. Upon this I shall only remark that the form adopted here is the same which was used in the celebrated case of the *City of London*, 3 Hargr. St. Tr. 545, and which was there adjudged sufficient. A like precedent is given in *Rex v. Amery*, 2 T. R. 515. I am perfectly satisfied, therefore, with the form of the pleadings."

In the case of *The People v. Bristol & R. T. R. Co.*, 23 Wend. 223, is also a case in point. In that case the attorney-general filed an information, charging that the Directors and Company of the Bristol and Rensselaerville Turnpike Road claimed, and for five years then last past had claimed, to be a body politic and corporate, by the name of the Directors and Company of the Bristol and Rensselaerville Turnpike Road, and by that name to levy and collect tolls, etc., all which privileges and franchises he charged to have been *usurped*. To this information there was a plea and replication. The sufficiency and form of the information was not doubted to be correct.

Of like character is the case of *People v. Hillsdale & C. T. R.*, 23 Wend. 254; to the same effect is the case of *Thompson v. People*, id. 537. See, also, *People v. Utica Ins. Co.*, 15 Johns. 362; *Commonwealth v. Tenth M. T. Co.*, 5 Cush. 509; Ang. & Ames on Corp., §§ 756, 776.

It will be observed that in all the foregoing cases against corporations, the informations charge the defendant with *usurping* their corporate rights and franchises, and the objections of the appellant in the case at bar would apply with equal force to the cases herein referred to, for in all these cases the defendant is charged with usurping to be a corporation, and, at the same time, a judgment of forfeiture is asked for against the corporation.

The foregoing authorities we think sufficient to settle the question that it is competent to bring an information against a corporation, and at the same time to charge the corporation with *usurping* its corporate powers. The simple question to be tried and determined is, whether or not the corporation, by their acts of misuser or nonuser, have forfeited their rights, franchises and privileges. If they have, their corporate acts are usurpations upon the people, and this is the matter to be tried. The people are not compelled to prove any thing. They call upon the corporation to show its title and authority, and, unlike other cases, the result of the case does not depend, and is not determined by the strength of plaintiff's title, but upon the title of the defendant. They must show a perfect title, and show that it has not been forfeited by any act of omission or commission. The issue is formed upon the plea and replication.

The information in the case at bar follows the forms that have been approved over and over again by the highest authority, except in this, that the district attorney has embodied and engrafted into his information the specific matters upon which he relies for forfeiture, making direct specific charges in addition to the general charge, instead of setting up the same in his replication; and the only effect of this mode of specifying the charges is to form an issue upon the information and plea instead of the plea and replication, and possibly to change the burden of proof in the trial of the cause, neither of which effects would vitiate the pleading.

We wish now to test this information, looking upon it as a complaint in a civil action under the requirements of the Practice Act.

A cause of action must be fully set forth in the complaint, for the reason that the proof cannot go beyond the averments. It is claimed that the complaint in this case is fatally defective in this, that there is no averment that the defendant is a corporation, and hence that its corporate character could not be proved, and that the absence of this proof would leave no case in court. The averments of the complaint are to this effect: That defendant claims to enjoy and use said privileges, franchises and liberties under and by virtue of an act of the legislative assembly of said Territory, entitled "An act to incorporate the Virginia City and Summit

City Wagon Road Company," approved January 27, 1865, but that the claims of defendant are without warrant, grant or charter, because of the specific acts of forfeiture set forth. The answer admits that defendant claims to use and enjoy said privileges, franchises and liberties under and by virtue of said act of the legislative assembly, but denies that its claims are without warrant, grant or charter, and specially denies the specific acts of forfeiture charged, thereby raising an issue to be tried as to whether or not the acts charged in the complaint are true; and the fair import and meaning of the averments in this complaint and answer is, that the plaintiff says the defendant claims to be a corporation, and the defendant admits the claim.

A reference to the statutes will show that the act of the assembly referred to in the complaint is an act "to *incorporate* the Virginia City and Summit City Wagon Road Company," and this is the company against whom this suit is brought, and the act referred to in the complaint shows the company to be an incorporation.

Section 61 of the Practice Act of 1867, which was in force when this action was brought, provides, that in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its passage, and the court shall thereupon take judicial notice thereof. Therefore it is that the reference to the act incorporating this road company, this defendant, must have the same force and effect as if copied into and made a part of the complaint; and, looking at the act as a part of the complaint, as we have the right, and as it is our duty to do, we shall find that the defendant is a corporation, and the act of incorporation being, in effect, a part of the complaint, an additional averment that the defendant is a corporation, would be surplusage, and wholly immaterial.

Therefore, looking at the complaint with the statute referred to as a part thereof, we think it sufficiently appears, and is affirmatively averred, that the defendant is a corporation, and this the defendant admits. And if there was no admission, the act incorporating the company, the defendant, is so pleaded that it could be proved by the introduction of the act in evidence, and any allegation in a complaint, sufficient to authorize proof under

it, is sufficient for all purposes. And treating this pleading as a complaint, we are satisfied that it states a cause of action.

The 8th section of the act incorporating the defendant, provides that, on complaint before a justice of the peace of the township, that said road is out of repair, the defendant shall be summoned to appear before such justice; and if on the trial it shall be found that the road is out of repair, and unsafe for travel, it shall be the duty of the justice to impose a fine of not less than \$10 nor more than \$25, and in addition thereto, to issue his order that no tolls shall be collected upon said road until it is put in good repair.

By virtue of this section it is insisted, upon the part of the appellant, that the remedy by information in the nature of a *quo warranto* to forfeit the charter is prohibited; that the remedy provided by the act of incorporation abolishes all other remedies, and that the action authorized to be brought before a justice of the peace excludes all other proceedings to forfeit the franchise. In other words, it is contended that the eighth section of the act incorporating this defendant, whereby the right is given to any person to make complaint before a justice of the peace, if the road is out of repair, at once abolishes the common-law remedy by *quo warranto*, and abrogates and annuls the 310th section of the Code providing remedies for usurpations of franchises, and forever prohibits the people from bringing an action to forfeit the charter of the company, no matter how flagrant their acts of usurpation or misuser may be; so that, if the claim of the appellant is upheld, this defendant is a perpetual, everlasting corporation, with a charmed life, and entirely beyond the reach of the people or the State, until it expires by the limitation of the act that created it.

If this condition of things was intended by the legislature; if it intended to abolish the common-law remedy, and the 310th section of the Practice Act, it should have made known its intention by the use of positive and unmistakable language, but as it said nothing upon the subject in the act incorporating the defendant, we cannot presume any such intention.

The eighth section simply provides for a private action at the suit of an individual, and does not pretend to interfere with the

remedy of the people, and the private action is not at all incompatible with the public remedy; and there is no implied or presumed intention upon the part of the legislature to, in any manner, cripple or abolish the remedy of the people or the State. There is no doubt an action lies, and always did lie, against a corporation for mischief to an individual, arising either from misfeasance or nonfeasance, and yet, because of this, the public remedy was never questioned. *People v. B. & R. T. Co.*, 23 Wend. 244.

And the same authority lays it down as a rule of almost universal application, that if a statute fixing a penalty for an offense do not either expressly or by necessary implication cut off the common-law punishment, or prosecution for the same offense, it shall be taken to intend merely a cumulative remedy. And with stronger reason does this rule apply when there is a general statutory remedy upon the same subject, which the particular statute or act does not attempt to modify or repeal.

We, therefore, hold that the eighth section of the act incorporating the defendant does not abolish, repeal or modify the common-law and statutory remedy for usurpation, intrusions into or unlawfully holding an office or franchise.

It is further argued, upon behalf of the appellant, that if the nonfeasance is not continued up to the commencement of the proceeding, or has ceased before the suit is brought, or is not an existing danger to the community, it is not a good cause for forfeiture. That is to say, there may have been divers and long-continued acts of forfeiture, the road may have been so out of repair for long periods of time, as to subject the corporation to a forfeiture of its charter, yet if, by the operation of natural causes or the acts of the company, the road happens to be in good repair, at the date of bringing the action against the corporation, this shall operate as a sort of condonation for the acts of forfeiture, as if a person offends against the law and afterward behaves himself, therefore he shall not be punished for the offense. This does not seem to be a very sound proposition.

Grants confirming franchises, rights and privileges are contracts between the sovereign power and private citizens upon certain implied or expressed conditions. A performance of these

conditions by the citizens is the consideration of the contract, and vests the franchise, and a non-performance of them forfeits it. These franchises, granted by the legislature, are an exclusive monopoly, and never should be made for the private advantage of any person, but solely for the public good, and when made, the conditions of the grant, whether implied or expressed, should be complied with like conditions precedent to any other contract. Precedent conditions, which must take place before the estate can vest, must be literally performed. *Thompson v. People*, 23 Wend. 537.

The condition precedent to the contract between this defendant and the people of the Territory was, that the defendant should construct and keep in repair the Virginia City and Summit City Wagon Road. This condition should be substantially complied with, and a failure to comply in a material particular would subject the franchise to forfeiture. Whether or not there was a performance, and compliance with these conditions, was the question tried to the jury, and as there is evidence to support the verdict, it cannot be disturbed here, and the judgment below is affirmed with costs.

Judgment affirmed.

UNITED STATES, respondent, v. UPHAM, appellant.

DISTRICT COURT — *jurisdiction and practice.* The Organic Act of Montana Territory, approved May 26, 1864, confers upon the district courts of the Territory the jurisdiction and practice of the district and circuit courts of the United States in cases arising under the constitution and laws of the United States.

CRIMINAL LAW — *peremptory challenges.* A party, who has been indicted for grand larceny and receiving stolen goods in violation of the laws of the United States, is entitled to three peremptory challenges to the jury impaneled to try the case, under chapter 333, acts 42d congress, approved June 8, 1872.

Appeal from Second District, Deer Lodge County.

At the trial, a jury was drawn from the regular panel, and passed for cause by the parties, after the jurors had been exam-

ined respecting their qualifications to serve. The defendant then challenged peremptorily one of the jury. The court, KNOWLES, J., overruled the challenge, and the jury was then sworn to try the case.

Chapter 333 of the acts of the 42d congress, approved June 8, 1872 (17 U. S. Sts. 282), provides that, in certain criminal cases, the United States and defendant shall be entitled to a number of peremptory challenges, "and in all other cases, civil and criminal, each party shall be entitled to three peremptory challenges."

W. F. SANDERS, SHARP & NAPTON, and SHOBER & LOWRY, for appellant.

Counsel referred to the said act of congress. Their arguments upon other points are omitted.

M. C. PAGE, United States Attorney, and W. H. CLAGETT, for respondent.

SERVIS, J. The appellant and Thomas C. Power were indicted by the United States grand jury for the second judicial district, in and for the county of Deer Lodge, at the October term, 1873. They were charged with grand larceny and receiving stolen goods in violation of the laws of the United States. A trial was had at said term, when Power was discharged, and appellant was convicted of receiving stolen goods, and sentenced to the penitentiary. From this action an appeal has been taken to this court, and many errors have been assigned, and are set out in the record of the case.

Among these errors is that of the refusal of the court to allow any peremptory challenges to the jury that was impaneled in the case. In its ruling thereon, we think the court erred.

The Organic Act of this Territory, wherein the jurisdiction of the United States district and circuit courts, in cases arising under the constitution and laws of the United States, is conferred upon our district courts, necessarily carries with it the practice of those courts. The attention of the court below could not have been called to the statute allowing the appellant three peremptory

challenges to the jury. Without considering the other errors, which are assigned, the judgment is reversed, and a new trial granted.

Judgment reversed.

ALVORD, respondent, *v.* HENDRIE, appellant.

STATUTORY CONSTRUCTION — *act securing mechanics' liens constitutional.* The act of the legislative assembly, approved January 12, 1872 (Cod. Sts., chapter 40), secures liens to mechanics for their labor, and confers upon the district court chancery jurisdiction to determine the rights and priorities of the liens of mechanics and mortgagees. The 6th section of the Organic Act of the Territory provides "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act." *Held*, that said act of the legislative assembly is constitutional. *Held*, also, that said act secures a lien to a mechanic for work which has not been performed under any contract.

MECHANICS' LIENS UPON QUARTZ LODGE AND MILL. A. made a contract with H. to perform labor at the rate of \$2,500 per annum, and work one-half of his time upon H.'s quartz lode, and the other half upon H.'s mill, in which the quartz taken from the lode was to be worked. *Held*, that A. can secure payment for said labor by filing and enforcing in the same action one lien upon the lode and mill, or two separate liens upon said property.

SAME — *time for filing lien by A. for said labor.* The time during which A. was to perform said labor for H. was not stated in said contract, and A. worked under it 21 months. The 6th section of said act of the legislative assembly makes it the duty of a person, wishing to avail himself of the said act, to file with the county recorder, within sixty days after said labor shall have been performed, an account of his demand. *Held*, that A. was not required to file said account within sixty days after the end of the first year to secure a lien for the sum then due from H. under said contract.

Appeal from Third District, Lewis and Clarke County.

THIS action was tried by WADE, J. Davis, one of the defendants, was interested in the property, and appealed from the judgment, which gave priority to the claim of Alvord against Hendrie over that of Davis. Hendrie did not appeal.

CHUMASERO & CHADWICK, for appellant, Davis.

Hendrie was not the owner or proprietor of the property in controversy, and had no interest therein. It must be shown that a defendant has an interest, which can be sold, before a court of equity will decree a sale. There is no proof to show that Hendrie was the owner.

The complaint is insufficient. It appears upon its face that the court had no jurisdiction in law or equity. It sets up two distinct causes of action, and asks for liens upon two separate estates. Houck on Liens, § 139; *Rathbun v. Hayford*, 5 Allen, 408.

Respondent was hired for one year only. His right to a lien expired sixty days after the end of the year, unless notice was filed and suit brought, as required by the statute. Cod. Sts. 510, § 6; 513, § 20. This was not done.

The evidence does not show that any work was performed by respondent, which entitled him to a lien under the statute. Respondent should prove the labor done upon each piece of property. The court could not ascertain it from the testimony. Houck on Liens, § 139; Cod. Sts., 509, § 1. A lien could only extend to the work actually done on the lode or mill. *Edgar v. Salisbury*, 17 Mo. 271.

Respondent claimed more than was due him, and his lien is, therefore, void. Houck on Liens, § 210; *Lynch v. Cronan*, 6 Gray, 532; *Underwood v. Walcott*, 3 Allen, 569.

Respondent claims a lien for working as an amalgamator in the mill. The statute gives no lien for this labor. The liens of Davis are prior to those of respondent, and were in existence before the second year of respondent's employment, and before any notice of lien was filed.

G. G. SYMES and SHOBER & LOWRY, for respondent.

Respondent performed work equally upon the mill and lode, according to his contract with Hendrie. The notice of lien was filed within sixty days after the completion of the labor, and this action was commenced within six months after the filing of the notice.

Mechanics' liens attach from the time of the commencement of

the building, and have priority over all incumbrances made thereafter. Sts. 1864, 334, § 8; *Dubois, adm'r, v. Wilson's Trustee*, 21 Mo. 214; Houck on Liens, §§ 50, 141; *Mochon v. Sullivan*, 1 Mon. 470; *Mason v. Germaine*, id. 263.

Courts construe the law favorably to mechanics' liens. Houck on Liens, §§ 66, 68. The same law of liens is applicable to mechanics and laborers working on mines. *Nolan v. Lovelock*, 1 Mon. 224; Sts. 1868, 80, § 1.

SERVIS, J. This was an action commenced under the mechanics' lien law of Montana Territory to enforce a lien for work and labor alleged to have been performed by the plaintiff and respondent for the defendant, Hendrie, upon a certain quartz mine and quartz mill.

The allegations of the pleadings in the case are, in substance, as follows:

That on the 1st day of August, 1869, the plaintiff, Alvord, entered into a contract with the defendant, Hendrie, whereby the plaintiff, being a mechanic, agreed to work for the defendant, for the sum of \$2,500 per annum, in and about the opening and developing of a certain quartz mine, of which the said defendant was the owner of thirteen-twentieths, known as the Whitlatch Union Quartz Mine or Lode, situate in Lewis and Clarke county, Montana Territory, and in about the building, erection and repairing of buildings and machinery upon the premises, known as a twenty-stamp quartz mill in Oro-Fino gulch, a short distance from said mine, all being more fully described in said pleadings as being owned by said Hendrie, one-half of the time of the plaintiff to be devoted to each of said work; that he commenced said work on the said 1st day of August, 1869, and so worked continuously thereafter until the 1st day of May, 1871; that on the 25th day of June, 1871, he settled with Hendrie, and an account therefor was stated between them, when there was found due plaintiff from said Hendrie, after deducting sundry credits and payments, the sum of \$3,787.50, which, it was agreed between them, should be a lien upon the mine and quartz mill in equal proportions; that on the 26th day of June, 1871, he perfected two separate liens upon said property, according to law, and, by

way of two separate causes of action in this proceeding, seeks to enforce the same, alleging therein that the defendants, Kelly and Davis, claim to have some interest or lien upon said property, who appear and answer separately.

Kelly, for answer, substantially denies the allegations of the plaintiff's complaint, averring the transaction between Alvord and Hendrie to be fraudulent and void; that the court had no jurisdiction over the subject of the action, and could not render a judgment *in personam* and *in rem* in the same proceeding; and, by way of cross-demand, claims a prior lien on said Whitlatch Lode for work and labor to the amount of \$235, to recover which he then had suit pending, and prayed judgment of dismissal.

Davis answered, denying substantially as did Kelly, and averring his interest in the property, viz., that of two mortgages executed by Hendrie, one of date of September 17, 1870, given to secure two promissory notes, one for \$2,000, dated February 15, 1869, the other dated June 7, 1869, for \$9,444, payable in six months; the other mortgage dated September 10, 1868, to secure \$5,400. Also a mortgage, executed by Hendrie to Norval Harrison, October 2, 1869, to secure the payment of \$4,490; also another mortgage, executed by said Hendrie and one E. B. Hendrie to W. B. Evarts to secure \$1,725, which last mortgages had been duly assigned to Davis, and suits were then pending to foreclose the same.

Upon these pleadings, including plaintiff's replication, the parties proceeded to trial to the court. The plaintiff, to maintain the issue on his part, offered evidence and proofs, among which were the recorded notices required by the lien law; conveyance from J. W. Whitlatch to Charles Hendrie; articles of agreement between Whitlatch, Tutt and others; also record of other deeds and mortgages, to all of which the defendant Davis objected, which was overruled and excepted to, and plaintiff rested.

The defendant Davis alone introduced evidence to maintain the issue on his part, and rested.

The court below made the following findings, viz.: That there is due plaintiff from defendant Hendrie the sum of \$3,787.50, with interest from June 25, 1871; that of this amount \$1,893.75 is a valid lien upon the mill, and \$1,893.75 is a valid lien upon

the mine; that the same became such liens on the 1st day of August, 1869; that the defendant Davis' mortgage of September 10, 1868, is a prior lien upon the mine; that defendant Kelly has a lien upon the mine for the sum of \$235, with interest, next in priority to that of plaintiff; that the lien second in priority upon the mine is that of plaintiff for \$1,893.75; that the defendant Davis, by virtue of the Harrison mortgage, has a lien upon the mill next in priority to plaintiff, and that his lien thereon by virtue of the Evarts mortgage is next in priority; that said Davis also has a valid lien upon the mill by virtue of his mortgage of date of September 17, 1870, and is next in priority to the lien of Kelly, and next in priority to the Evarts mortgage, and rendered its decree accordingly, and for the sale of defendant Hendrie's interest in the property in question, for the payment in the order of priority so found by the court.

To all of which the defendant Davis objected, and duly appeals to this court, claiming as *grounds for reversal*, that under the pleadings in the case the court had no jurisdiction over the subject of the action; that it could not be ascertained therefrom whether the action was one at law or in equity; that if it was one in equity, the relief sought by way of personal judgment and a decree for the sale of the incumbered property, to satisfy the respective liens, could not be granted; that the evidence did not warrant the findings of the court, and especially as to the ownership of the property by Hendrie, the amount of labor performed upon each species of property, and that the court erred in giving priority to plaintiff over appellant.

This proceeding was commenced under and pursuant to the mechanics' lien law, passed by the legislative assembly of this Territory in 1864, amended in 1868, and re-enacted in the codified laws in January, 1872, and is purely and expressly a statutory proceeding. Under this law it is provided that every person who shall perform work upon, or furnish material, machinery or fixtures for, any building, erection, bridge, flume, canal, ditch, mining claim, quartz lode, ranche, city or town lots, or other improvement upon land, or for repairing the same, upon complying with the provision of the act, shall have for the same a lien thereon to secure the payment for the same, to the extent of all the right,

title or interest owned therein by the owner *or* proprietor of the same; and such lien shall have preference upon the *structure, etc.*, over any prior lien or mortgage on the *land* where the same is erected. And the act further provides the *mode* of proceeding to enforce the same: that the proceeding shall be commenced in the district court; that the pleadings, practice, process and other proceedings shall be as in ordinary civil actions, except that the petition (complaint) shall allege facts necessary to secure a lien; shall describe the property charged therewith; and all persons interested in the property may be made parties to the action.

The *court* shall then ascertain, by a fair trial, in the usual way, the amount of indebtedness for which the lien is established, and render judgment for the same and for costs of suit; and if the property is insufficient to pay the same, then the residue be collected as upon ordinary executions.

All the proceedings in this case having, as we think, sufficiently conformed to the provisions of this act, the question of the jurisdiction of the court in the premises depends upon the right of the legislative assembly so to enact.

We are of the opinion that this was a rightful subject of legislation, that by it no jurisdiction was taken from the court inhibited by the Organic Act of this Territory. The security or lien created by it was, it is true, in derogation of the common law, but similar to that of nearly all of the States and Territories of the United States, and always recognized as a rightful subject of legislation. The kind or character of jurisdiction provided for the enforcement of the lien, was that of chancery; the chancery side of the court was appealed to, without it the appellant would not have been a proper party to the proceeding, and his rights, as well as the rights of the plaintiff and others, might have been prejudiced. And we are unable to see wherein the rights of any of the parties have, or could have, been prejudiced by reason of the jurisdiction taken, or in the mode of the proceedings held in this case.

It is, however, claimed by appellant that the evidence, as shown by the decree, did not warrant the findings and conclusions of the court below, as to the ownership of the property by Hendrie: as to the amount of labor performed on the mill and on the mine in question; and that the lien of plaintiff was not perfected ac-

cording to law, in that the notices of lien were not filed within sixty days from and after the end of the first year of work by plaintiff.

We have examined the evidence presented by the record in this case, and have no difficulty in finding that the evidence was sufficient to establish the ownership of the property in question, as claimed, in the defendant Hendrie. It does not appear that any other person has or claims any other or greater interest, except it be the answering defendants, who claim under and from the same character and title.

If any doubt existed as to this finding of ownership, we think a reference to the twenty-first section of the act herein alluded to would at once settle the doubt, for it is therein provided, "Every person, including all *cestuis que trust*, for whose immediate use, enjoyment, or benefit, any building, erection or improvement shall be made, shall be included by the word "owner," or "proprietor," under this act, not excepting such as may be minors over the age of eighteen years, or married women."

In relation to the sufficiency of the proof as to the amount and character of the work performed generally by the plaintiff, and of the amount and character performed upon each of the kinds of property, we are of the opinion that the proof shows that the plaintiff fully complied with the terms of his contract with Hendrie. It is true, the evidence shows that he performed some small amount of work that might not be the subject of a lien under the statute, such as amalgamating, but to what amount it is not shown; and we may well infer, from the proof, that it did not exceed the amount that had been paid him before filing his lien. There is also proof tending to show that the plaintiff did not, and could not, from the character of the business, have worked *all* the time for which he has charged. All this may be, in fact, true; but how does that deprive him of a lien for the *amount* (value) of work done and performed? No proof was introduced even tending to show that what work the plaintiff, in fact, did do, was not worth at the rate of \$2,500 per year. And when the plaintiff ceased working he settled with Hendrie for the same, stating an account as it existed between them, finding a balance due plaintiff of \$3,787.50. And there was not shown

to have been any fraud or collusion between plaintiff and Hendrie. And although their *agreement* then, apportioning the lien equally upon the mill and the mine, could not make the same so in law, no more could such an agreement defeat the law.

The contract between the parties was, that the plaintiff was to work for the defendant at \$2,500 per annum, one-half the time on the mill, the other half on the mine; exactly *how* this time was to be divided is not stated or shown. Neither is it shown that the exact amount and value of labor was not, in fact, performed as apportioned by the court below upon each species of property. And however material or immaterial the failure to establish these things may be, we are of opinion that, under the contract between the plaintiff and Hendrie, and the facts as shown as to the labor performed, that the whole amount thereof, as found due by their settlement, was, in law, a valid lien upon all the property, both mine and mill property, of which the defendant had interest in; and although he proceeded to enforce the same as upon two separate causes of action joined in one, yet, nevertheless, it was, in law, but one transaction, under one and the same contract, undivided and indivisible, and, therefore, constituted but one cause of action; and the separating them into two liens and two causes of action joined in one is not erroneous, especially as no objection was taken by demurrer, motion or otherwise, either before or on the trial. It is also objected, that because the plaintiff did not perfect his lien within sixty days from the end of the first year of labor, that the same is thereby lost for that year.

Our statute creating or giving this kind of lien is unlike any other statute we are acquainted with, except that of California, Idaho and Arizona. Ours and theirs do not make it necessary that any *contract* should exist for the performance of the labor, etc., in order to entitle the party to a lien for such labor, etc. It simply provides, that every person who shall do and perform labor upon any property of another, by complying with the conditions therein specified, shall have a lien, etc. Nowhere in the whole act is there any reference to a *contract* between the parties. Now the conditions specified to be complied with are, that, within sixty days *from the time the work shall have been performed*

the party claiming such lien shall do certain things, viz., file an account, etc., with the county recorder. These things, we find, were duly done by the plaintiff in this case. But if we were in doubt as to this, we need but look to the whole of the facts in the case. The contract between the parties was, that the plaintiff was to work upon these two kinds of property for the consideration of \$2,500 per annum; *i. e.*, by the year, or at that rate per year, not for *one* year. The time was indefinite; it might extend to many years; and, indeed, from the character and nature of the business, we might well infer that it might extend to many years, if they could agree. At all events, there was no new contract made at the end of the first year, but the work continued until the 1st day of May, 1871, when it ceased, and was then settled for as of one continuous contract, and that, too, without difference or dispute, or fraud proven.

The decree rendered in this case may have gone further than it ought. Indeed, we cannot well see how, under the present law, it could have gone so far as to foreclose the rights of persons not parties to the suit; although, under some statutes, such authority seems to be given; yet we are unable to find wherein the court has transcended its jurisdiction or power to the detriment or injury of this appellant. And, indeed, the court gave the appellant relief that might well have been refused under his pleadings and prayer for relief.

The judgment and decree of the court below are, therefore, affirmed.

Judgment affirmed.

NOTE.—The Supreme Court of the United States has passed upon one of the questions referred to in the arguments of counsel and the opinion of the court. In *Davis v. Bilsland*, 18 Wall. 661, Mr. Justice BRADLEY says: "The language of the eighth section of the Mechanics' Lien Law of Montana is unambiguous. The liens secured to the mechanics and material-men have precedence over all other incumbrances put upon the property after the commencement of the building. And this is just. Why should a purchaser or lender have the benefit of the labor and materials which go into the property and give it its existence and value? At all events, the law is clear." — REP.

TERRITORY OF MONTANA, respondent, v. LEE, appellant.

STATUTORY CONSTRUCTION — *void act*. Courts will not declare a statute void, unless there has been a manifest assumption of authority by the law-making power.

RIGHTS OF CHINESE UNDER "BURLINGAME TREATY." The sixth article of the treaty between the United States and the Empire of China, promulgated February 5, 1870 (16 U. S. Sts. 739), does not grant to the Chinese in the United States greater privileges than are guaranteed by the laws of congress to other aliens.

RIGHTS OF ALIENS UNDER ORGANIC ACT. The Organic Act of the Territory, approved May 26, 1864, does not sanction the principle of the common-law, which prohibits aliens from holding real estate.

MINERAL LAND — *power of congress and legislature*. Congress, by the acts relating to the mineral land of the public domain, approved July 26, 1866, July 9, 1870, and May 10, 1872, has recognized the authority of the legislative assembly of the Territory and miners of districts to enact laws regulating the extent of mining claims, which can be located, and the manner of working and developing the same, and appropriating the minerals therein contained. But the power to control and dispose of said land has been conferred upon congress by the constitution, and cannot be delegated to said assembly.

SAME — *act concerning aliens holding same, adjudged void*. The Territory has no right or title to the unappropriated mineral land within its boundaries. The act of the legislative assembly concerning mines held by aliens, approved January 12, 1872 (ch. 82, Cod. Sts. 593), which provides "for the forfeiture to the Territory of placer mines held by aliens," interferes with the primary disposal of the public domain within the Territory, and is, therefore, inconsistent with the sixth section of said Organic Act, and void.

POWER OF TERRITORIAL GOVERNMENTS — *sovereignty*. The Territory has none of the essential attributes of sovereignty, and is a province, over which congress exercises supreme control. The laws of the legislative assembly can be repealed by congress, and the Territorial courts have no final jurisdiction in cases in which the amount in controversy exceeds \$1,000. The authority to enact laws for the forfeiture of mineral public lands is a prerogative of sovereignty, and cannot be exercised by said assembly.

RIGHT OF CITIZENS AND ALIENS TO MINERAL LAND. Said act of congress, approved July 26, 1866, gives to citizens, and those who have declared their intention to become citizens, the right to enter upon, explore and possess the mineral lands of the United States, and excludes therefrom the Territory, aliens and all others. *Held*, that this act does not authorize the forfeiture of the title of aliens to said land. *Held*, also, that aliens can hold and enjoy the possessory title to said lands within the Territory.

Appeal from Second District, Deer Lodge County.

THE judgment in this action was rendered by KNOWLES, J.

SHARP & NAPTON and S. WORD, for appellant.

A Territorial government is one of limited powers. The people are only authorized to act by virtue of the Organic Act. *Hepburn v. Ellzey*, 2 Cr. 445; *New Orleans v. Winter*, 1 Wheat. 91.

The "Alien Law" is not upon a rightful subject of legislation. It interferes with the primary disposal of the soil. 1 Kent's Com. 431; Organic Act; *Williams v. Bank*, 7 Wend. 539; 2 Story on Const. 192; *Scott v. Sandford*, 19 How. 395; Webster's Speech on Foot Resolution, January, 1830.

The Territory cannot acquire any title to unpatented mines. It cannot forfeit mines on account of alienage, and sell them for its benefit, when the fee simple is in the national government. An alien who works upon vacant mineral land is a trespasser upon the property of the United States, not upon that of the Territory. The national government, through its attorney-general, might have what is termed "office found," and eject the trespasser. The Territory, through the district attorney, cannot. 1 Washb. Real Prop. 50. Sovereignty alone can drive an alien from a mine to which he has the possessory title.

The words "primary disposal of the soil," in the Organic Act, have a well-defined meaning. 2 Story's Const., ch. 30; 1 Bl. Com. 250. Congress used them in their legal sense.

The exercise of the power of alienage is that of a great sovereign power. *Augusta v. Earle*, 13 Pet. 559. Forfeiture is the penalty of a crime. The power exercised by the legislature in the passage of this law is that of escheat.

The act violates the "Burlingame Treaty." The subjects of China are guaranteed the rights of the most favored nations. Arts 5-6. Cannot a Chinaman lease property? If he can, he can become possessed of it. If you forfeit that, you interfere with the primary disposal of the soil. Blackstone says a lease is a primary conveyance, or disposal of the possession, or right of possession of the soil.

Legislatures cannot enact that one person can hold by comply-

ing with the law, and another shall not. Distinctions on account of race or color are "*ante bellum*" fossils.

H. N. BLAKE, District Attorney, First District, for respondent J. C. ROBINSON, District Attorney, Second District, filed an argument in writing.

The act referred to by appellant should not be declared void, unless there is a clear repugnance between it and the constitution or law of congress. Sedgw. Const. L. 482; *S. & V. R. R. Co. v. Stockton*, 41 Cal. 160; *Fletcher v. Peck*, 6 Cr. 87.

Under the laws of congress, the right to explore and occupy the mineral lands is limited to citizens of the United States, and those who have declared their intention to become such. This act of the legislature is in harmony with these laws and the common law. Yale on Mining Claims, 75-77, 355-357; Acts of Congress of July 26, 1866, July 9, 1870, and May 10, 1872; Bl. Com., Bk. 2, ch. 15, § 6.

This act was passed to prevent aliens from acquiring the right to work placer mines. It does not dispose of the soil of the Territory. The laws of the United States relating to pre-emptions, homesteads, railroad grants, etc., have disposed of the "soil." Washb. on Ease. 14, 596; *McClintock v. Bryden*, 5 Cal. 100; *Irwin v. Phillips*, id. 146; *Fitzgerald v. Urton*, id. 309.

Under this act, no right or title of the United States is sold or forfeited. The purchaser of the mine acquires the interest which the alien had.

At common law, an alien could not hold real estate. He could be divested of title upon inquisition by the attorney-general. 2 Kent's Com. 61. This principle is a part of the Territorial law. Organic Act, § 9.

This act is a rule adopted by the legislature according to the laws of congress, which have left the mode of acquiring possession, etc., to the miners and legislature.

WADE, C. J. This is an action brought under and by virtue of an act of the Territorial legislature, entitled "An act to provide for the forfeiture to the Territory of placer mines held by aliens." Cod. Sts. 593. The act substantially provides that no alien shall

be allowed to acquire any title, interest, or possessory or other right to any placer mine or claim, or to the profits or proceeds thereof in this Territory, and that whenever it shall be made to appear to any district attorney that any alien is in possession, occupation, use or enjoyment of any placer mine or claim, within the district of such district attorney, or that any alien claims any right, title or interest in or to any such mine or claim, by pre-emption, location, acquisition, or by gift, grant, bargain, sale, conveyance, transfer, assignment, lease or mortgage, it shall be the special duty of such district attorney, forthwith, to institute in the district court of the proper county an action in the name of the Territory, against such placer mine or claim for the forfeiture thereof to the Territory. And the act further provides, that if upon the trial it shall be made to appear that the mine or claim in question is occupied, possessed or claimed by an alien, or that any right or interest therein has been sought to be conveyed to or vested in such alien, or in any one for his use or benefit, the court shall thereupon render a judgment of forfeiture to the Territory of such mine or claim, of whatever right, title or interest the alien would have acquired had he been a citizen; and upon this judgment there shall be an execution and sale, for the benefit of the Territory, and the proceeds of such sale shall be paid into the Territorial treasury for the use of the Territory.

The complaint in this case sets forth the necessary averments under this statute, alleging that the defendant, **Fauk Lee**, is an alien, and a subject of the Chinese Empire, and that he purchased of one Stevens, and by virtue of such purchase now holds, claims, occupies, and is possessed of three thousand feet of placer mining ground in the complaint described. There was a demurrer to the complaint, which was overruled, and judgment was rendered for the plaintiff, that the mining ground described in the complaint be forfeited to the Territory, and sold in pursuance of the provisions of the act aforesaid. From this judgment defendant appeals to this court.

By this appeal we are called upon to determine the validity of the statute, under and in pursuance of which the action was brought and prosecuted to judgment, and in making this investi-

gation it will be convenient to inquire: first, what were the rights and disabilities of aliens in this Territory prior to the enactment of this statute; second, as to the power of the Territorial legislature to enact a law of this character; and third, is the act in question in harmony with the Organic Act of the Territory?

1. As to the right of an alien to purchase and hold real property, it may be stated as a general principle, deducible from the authorities, that alienage is a disability that can only be taken advantage of by the government, or the sovereign power in a State, and that the real property purchased by an alien does not vest in the government until office found, that is, until a proceeding before a jury, to inquire as to the question of alienage, and, until such inquiry by the government, the alien is seized, and may protect and defend his property as a citizen, and may institute actions and prosecute suits under the laws for this purpose; and that as to sales and transfers of real estate, by or to aliens, they stand upon the same footing as sales and transfers made by citizens, subject only to the right of the sovereign power of the government to institute proceedings to cause a forfeiture.

This proposition is sustained in 2 Blackstone, 249, note 18, wherein it is asserted that the law, as to purchases by aliens, is shortly this: that the purchase vests the land in the alien, but subject to be divested out of him for the benefit of the Crown, by the finding of an inquisition in the exchequer. An alien may be grantee in a deed, though his holding is precarious; for, on office found, the king shall have it by his prerogative. 2 Black. 273, note 14; Co. Litt. 2, b; 5 Co. 52; 1 Leon. 47.

"If," says Lord COKE (Co. Litt. 2), "an alien purchase houses, lands, tenements or hereditaments to him and his heirs, albeit he can have no heirs, yet he is of capacity to *take* a fee simple, but not to hold, for, upon office found, that is, upon the inquest of a proper jury, the king shall have it by his prerogative, of whomsoever the land is holden, and so it is if the alien doth purchase land and die, the law doth cast the freehold upon the king," but the estate purchased by an alien does not vest in the king until office found, until which time the alien is seized and may sustain actions for injuries to the property. 5 Co. 52, b; 1 Leon. 47; 2 Black. 293, note 10.

An alien may purchase lands and hold them against all the world but the State. Nor can he be divested of his estate even by the State until after formal proceedings, called "office found;" and until that is done, may sell and convey or devise the lands, and pass a good title to the same. 1 Washb. Real Prop. 50, and authorities there cited.

An alien friend is entitled, at common law, not only to take and hold real estate, until office found, but to maintain an action for its recovery in case of an intrusion by an individual. *Bradstreet v. Oneida Co.*, 13 Wend. 546.

In the case of *McCreery v. Allender*, 4 Harr. & McH. 409, the supreme court of Maryland decided that the title of an alien friend is good against everybody but the State, and that his right and possession could not be divested but by office found, or some act done by the State to acquire possession, and judgment was given for the plaintiff, who was an alien and a British subject. See, also, *People v. Folsom*, 5 Cal. 373. This question has also been passed upon by the supreme court of the United States (*Craig v. Leslie*, 3 Wheat. 563), and the foregoing propositions fully and clearly sustained.

Alienage, then, is not a disability that can be taken advantage of by a private individual, and, as between citizen and alien, their titles are equally sacred and secure, and equally entitled to the protection of the law.

Only the sovereign power of the State or government can demand forfeiture of an alien's property, and this authority proceeds from the right of self-protection which inheres in every government, giving it the power of self-preservation. But this is a great sovereign prerogative right, which belongs only to the supreme power in a State, and cannot be exercised by any subordinate, secondary or limited depositary of power. The authority to naturalize and to impose disabilities upon aliens belongs alone to sovereign power, and this leads us to the discussion of the second proposition concerning the sovereignty of a Territory.

2. Does the Territory of Montana possess the inherent sovereign power necessary to enable it to cause the forfeiture to itself of the property of aliens, situate within its territorial limits? And does it possess the power to forfeit to its own use and benefit

property that never belonged to the Territory, in which the Territory never had any interest, the title to which still remains in the United States, subject only to a possessory easement acquired by individuals, by leave and license granted by the general government? In other words, can the Territory forfeit to its own use, and thereby become the owner of property which the government, in its liberality, granted only to citizens and to those who have declared their intention to become such? And if there is a forfeiture of this possessory title which the government has granted to individuals, does not the property forfeited necessarily revert back to the general government, the original grantor? The solution of these questions necessarily leads to a discussion of the sovereignty of a Territory under the constitution and government of the United States. Before entering upon this subject, however, we wish to premise by saying that primarily the general government is the owner of all the soil within its territorial limits, and that it is the fountain and source from whence all title to the soil is acquired, and that by reason of this fact the right of forfeiture vests in the sovereign power of the general government; and the particular inquiry now is: Are the organized Territories belonging to the United States clothed with this sovereign power?

What do we mean by the term "sovereignty?" It is the exercise of, or right to exercise, supreme power, dominion, sway; and, as applied to a State, it is the right to exercise supreme power, dominion, authority. Says Vattel in his Treatise on the Law of Nations: "Nations or States are bodies politic — societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their mutual strength. Such a society has her affairs and interests. She deliberates and takes resolutions in common, thus becoming a moral person who possesses an understanding and a will peculiar to herself. From the very design that induces a number of men to form a society which has its common interests, and which is to act in concert, it is necessary that there should be established a public authority to order and direct what is to be done by each in relation to the end of the association. This political authority is the SOVEREIGNTY."

And this *sovereignty*, we may add, is the elemental prerogative of a nation, an essential attribute that gives to it being, life and

character, and without which it can have no existence. Sovereignty makes a nation; it forms a State, and the lack of it makes a colony, a province, a dependence. Sovereignty implies the right to make laws and to enforce them, and the laws it enacts cannot be modified, altered or abolished, except by the same supreme power which enacts them. To this power belongs the authority to define the rights of persons, and it may regulate the manner and circumstances under which property is held, and may direct the modes of administering justice.

To this power belongs the right to declare war; to raise and support armies; to make treaties of peace, and to use all necessary means to self-preservation and protection. Sovereignty then signifies independence, absolute freedom and liberty, and a superiority to and exemption from every foreign or extraneous influence. Every nation, like every individual, possesses the inherent right of self-defense, and for this purpose it may use or destroy the property of its citizens, and to this power of a nation may be referred its right to make laws of escheat, and forfeiture, providing when and under what circumstances property shall become forfeited to the State. The authority to enact laws of forfeiture is a sovereign prerogative, and belongs only to the supreme power of a nation. Is this sovereign power lodged in the Territory of **Montana**?

The region of country now included within the limits of this Territory was acquired by the United States from France by virtue of the Louisiana purchase in 1803. Out of this vast region thus acquired, several States have been formed and admitted into the Union, while in the balance of this Territory temporary governments have been established by congress preparatory to their admission as States. By what authority does congress thus assume to exercise jurisdiction and control over the several territories belonging to the government? We might well argue that the right to acquire territory implied the right to govern it, and, if there was no controlling law on the subject, it might be well said that if the United States has the right to purchase territory from a foreign power, it could, after the purchase, exercise absolute dominion and authority over the property so purchased, but we

are not compelled to resort to any implied power in determining the source of authority over the territories.

Section 3, article 4, of the constitution, provides that congress shall have power to dispose of and make all needful rules and regulations respecting the territory, or other property belonging to the United States. Under and by virtue of this clause of the constitution, from time to time congress has authorized and established temporary governments for the territories, the first of which was provided by the ordinance of 1787, and afterward adopted by congress, and from thence continuously until the present time. The governments thus established were and are temporary in their character, and only designed to subserve a temporary purpose. These governments were, and now are, and at all times have been, under the complete control of congress, and subject to abolition, modification or change, at the behest of the power which created them, and the laws enacted by the territorial legislatures are alike subject to modification or repeal by the action of congress. These inherent infirmities in the governments, and legislative enactments of the territories, at once rob them of all the essential attributes of sovereignty, and make them provinces, over whom the United States exercises supreme control. Under and by virtue of this clause of the constitution, above recited, congress could sell and dispose of a territory to a foreign power, and not only can it make all needful rules and regulations concerning the territories, but can also abolish them, and the rules and regulations made by congress are enacted laws, and congressional rules for the territories can be made in no other manner.

With these sovereign powers residing in the general government, it seems idle to contend that a territory is sovereign and supreme in any department of its authority.

These views and principles seem to be well supported by authority. Chancellor KENT, commenting upon the Territories belonging to the United States, says (vol. 1, pp. 383-5): "With respect to the vast territories belonging to the United States, congress have assumed to exercise over them supreme powers of sovereignty. Exclusive and unlimited power of legislation is given to congress by the constitution, and sanctioned by judicial decisions. * * * The general sovereignty existing in the govern

ment of the United States over the territories is founded on the constitution, which declared that congress 'should have power to dispose of and make all needful rules and regulations respecting the territories.' * * * It would seem, from these various congressional regulations of the territories belonging to the United States, that congress have supreme power in the government of them, depending upon the exercise of their sound discretion."

The government of the United States, which can acquire territory by conquest, must, as an inevitable consequence, possess the power to govern it. The Territories must be under the jurisdiction and dominion of the Union, or be without any government; for the Territories do not, when acquired, become entitled to self-government, and they are not subject to the jurisdiction of any State. They fall under the power given to congress by the constitution. *American Ins. Co. v. Canter*, 1 Pet. 511.

In the same case, MARSHALL, C. J., says that congress, in legislating for the Territories, exercises for them the combined powers of the general and State governments.

Neither can it be said that congress, in giving to the Territories an organic act, delegates any of its sovereign authority; for not only can the organic acts be altered or abolished, but all laws made under and by virtue thereof, by the Territorial legislatures, are subject to congressional supervision, showing that sovereignty alone resides with congress. It may, however, be said that a Territory is a distinct political society, and, therefore, sovereign in its action, except as limited by the Organic Act, as the States of the Union are sovereign, except as limited by the Federal constitution. To this it may be answered that sovereignty does not abide with the Territory, for the reason that its action is subject to approval or disapproval by a higher authority, while congress exercises and can exercise no authority whatever over the enactments of a State legislature. To the State in the Union the people are secured the right of self-government, while the people of the Territories have not this right and depend for their government on the will of congress. The State regulates its own internal concerns, while congress directs the internal affairs of a Territory.

In a Territory the courts have no final jurisdiction. An appeal being allowed to the supreme court of the United States in every case, only limited by the amount involved, the legislature acts with limited and contracted authority, and all its laws and statutes are subject to the approval or disapproval of congress; and the power of the executive and the tenure of his office are likewise subject to the sovereign power and will of congress and the president, and in nothing pertaining to the existence, organization or power of a Territory is it sovereign and master of itself. The general government may sell it to a foreign power, may abolish its government, may annex it to another Territory, or may divide or change its form of government; its executive is the mere creature of the president and the senate; its organic act, creating a judiciary and a local legislature, may at any time be altered and abolished. Therefore it is that a Territory has no sovereign power or authority whatever, and, hence, has no authority to impose disabilities upon aliens within its limits, and much less has it the right to confiscate to its own use and benefit their property. Laws providing for the forfeiture of real estate, or any interest therein, while yet the title remains in the United States, and while, if any forfeiture is had, the property rightfully reverts to its original owner and proprietor, do not come within the scope of rightful subjects for Territorial legislation, for legislation upon this subject, by every analogy, belongs exclusively to congress.

Before the passage of this act of the Territorial legislature forfeiting the property of aliens within the Territory, the alien could hold, and did hold and enjoy, the possessory title to mining claims, procuring such title by purchase, which title was an easement therein, the balance of the title belonging to the United States, so that the alien and the government, taken together, owned the complete title. The Territory had no interest whatever in the claims, held by aliens or by any other persons, and no title or shadow of title thereto, but by the operation of this statute the Territory becomes the owner of the possessory title which is or may be the entire equitable interest, and is authorized to sell the same for its own use, so that, by the force of this statute, it becomes the owner of property in which it never had any interest, and which never belonged to it, and it forfeits the property of an

alien and calls it its own, while if any forfeiture takes place for any reason whatever, the property thus forfeited necessarily belongs to the United States. The Territory cannot acquire title to property that does not and never did belong to it, so easily as this.

There might be reason and plausibility in a statute of this kind, providing the Territory was clothed with sovereign power, and owned the paramount title to the property sought to be confiscated, but in the absence of sovereignty, and in the absence of any title or interest in the property, and while the general government is yet the owner of the legal title, and while, if any interest in the property is forfeited, it naturally and rightfully reverts to the sovereign, the general government, who holds the paramount title to all the property within its limits, it certainly is an unwarranted exercise of power for the temporary government of a Territory, to undertake, by forfeiture, to convert to its own use property, which, if subject to forfeiture at all, should be forfeited to the government of the United States.

Unquestionably, congress could enact and enforce a law similar in its provisions to the one under consideration, because it is clothed with the necessary power, and because the unoccupied lands in the Territories belong to the government, and it has the right to say who shall possess such lands; and exercising this right, by the act of July 26, 1866, the government authorized citizens, and those persons who have declared their intentions to become such, to enter upon, explore and possess such unoccupied mineral lands, and, if persons not authorized by this act, enter upon such lands, or if they acquire, by purchase, the possessory title to the same, and thereby the lands become subject to forfeiture, it is a matter for the general government to take action in relation to, and in which the Territory has no right and no interest. It will be observed that this act of congress does not prohibit citizens, who rightfully acquire this possessory title, from selling and transferring the same to aliens, or to any other persons. But with no statute upon the subject, and by virtue of the common law, if an alien takes a title to a possessory right in any such lands, upon proper inquisition before a jury, or upon office found, such title could be forfeited to the government, and this sovereign right be-

longing to the general government, the sovereignty of the Territories, as to this matter, is necessarily excluded.

Only those persons authorized by the act of July 26, 1866, are licensed to enter upon, explore and possess the mineral lands belonging to the United States. The persons given this right by virtue of this act are citizens and those who have declared their intention to become citizens. All others, by necessary implication, are excluded, and this exclusion would apply to a State, or a Territory, as well as to an alien, and the very terms of the act that excludes aliens from *entering* also excludes the Territory from *holding* the possessory title to the mineral lands, and an action for forfeiture by the general government against the Territory in such case would be much more appropriate than such an action by the Territory against an alien.

The Territory lacks three essential elements necessary and requisite in order to enable it to maintain this action, and in order to give validity to this statute. First. The sovereign power and authority to confiscate and forfeit to itself property, and especially property in which it has no interest, and no title, the sovereignty of the United States and its title necessarily excluding any action by the Territory; Second. The Territory is not the party in interest, and is officiously meddling with what does not concern it; and, Third. The inability of the Territory, under the act of 1866, to take and to hold the possessory title to the mineral lands belonging to the United States.

It is argued that this statute of the Territory does not conflict with the act of congress of 1866, which provides that only citizens, and those who have declared their intention to become citizens, shall have the right to enter upon and possess the mineral lands, and that this statute confiscating the possessory titles of aliens is only in aid of the act of congress. But it will be observed that the act of 1866 does not authorize the forfeiture of the title of aliens, and if it did the forfeiture would take place to the United States, and the Territory could take no action in the matter unless specially authorized by congress. The Territory is not called upon to aid congress or the executive in the execution and enforcement of the laws of the general government, and

the voluntary aid of the Territory is without authority, without reason, and therefore void.

3. Is the statute in question in harmony with the Organic Act of the Territory?

The Organic Act provides, section 6, that the Territorial legislature shall pass no law interfering with the primary disposal of the soil. Notwithstanding the Organic Act whereby a temporary government is created for the Territory, the general government, being the owner of the soil, still retains its ownership, and has made all the necessary laws and regulations directing how its property shall be disposed of, and how title thereto shall be conveyed. The Territory can enact no valid law that, in any manner, impedes, modifies or varies the operation of the laws of the general government as to the disposal of its lands. Neither can the Territory do, by indirection, what it is prohibited from doing directly, so that, if any Territorial statute, enacted for a local, or for a temporary purpose, in its workings, in its operations and effects, defeats the laws of congress as to the disposal of the public lands of the Territory, such statute is necessarily void. The statute in question provides that the mining claims held by aliens shall be forfeited to the Territory, so that the Territory becomes the owner of the possessory title to such claim. Laying aside the fact that the Territory thus becomes the owner of property that does not belong to it, yet it obtains possession of the title, and this possession necessarily interferes with the disposal of the soil by the United States to the citizen or settler. If the possessory title is forfeited, the property should again become subject to location by the persons entitled to make such location, but the Territory comes forward and says, by its legislature, "that although the title to this property is forfeited, and it thereby becomes subject to entry and location, yet I have acquired this property, and if any one obtains possession of it they must purchase of me." The Territory thus acquires a possessory title in violation of the act of 1866, and in direct violation of the Organic Act, for the title of the Territory interferes directly with the primary disposal of the soil to the citizen by the general government. It does not require argument or authority to determine that if the Territory holds possession of mining claims it

interferes with the acquisition of possession by the citizen, and thereby interferes with the disposal of the soil; and the fact that the Territory is authorized to sell its possessory title by causing an execution to issue, does not help the matter, for by this means the primary disposal of the soil is transferred from the general government to the Territory. This statute is in conflict with the Organic Act.

The act of congress of May 10, 1872, "to promote the development of the mining resources of the United States," in its spirit and intention, is in direct conflict with the Territorial statute under which this action was brought. The act of congress, after defining the mode and manner by which titles to the mineral lands may be acquired, and providing when and to whom patents may be issued, enacts that "nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever;" that is to say, after the citizen, or those who have declared their intentions to become such, shall have acquired title to their mining ground from the government by patent, they shall have the right to sell the same to any person whatever, whether such person be alien or citizen, Chinaman or American. If the absolute title can be thus conveyed to an alien, it would be strange indeed if the mere possessory title or right could not likewise be conveyed to the same individuals. If the alien is made capable by the general government of holding the highest title, by what process of reasoning do we arrive at the conclusion that the Territorial legislature can say that if he acquires a mere possessory title, it shall be forfeited? It was clearly the intention of congress, by the act of May, 1872, to authorize and permit the citizen who had obtained a patent to his mining ground to sell the same to aliens if he so desired, thereby to aid the development of our mineral resources by the use of foreign capital; and as long as this act remains in force there can be no reason or validity in or to a Territorial statute subjecting the inferior titles of aliens to forfeiture and confiscation, while their absolute titles are made sacred by the act of the general government.

The judgment below is reversed and cause remanded.

Judgment reversed.

SERVIS, J., concurring. This was a proceeding, instituted by the district attorney for the second judicial district for the county of Deer Lodge, for the forfeiture to the Territory of Montana of 3,000 feet of mining ground, purchased by the defendant, Faulk Lee (a Chinaman), from one S. Stevens, in September, 1872, under an act passed by the legislative assembly of the Territory, January 12, 1872, entitled "*An act to provide for the forfeiture to the Territory of placer mines held by aliens,*" whereby all aliens are prohibited from acquiring any title, interest, or possessory or other right to any placer mine or claim within this Territory or to any profits or proceeds thereof. And it further provides for the mode of procedure to forfeit the same. Cod. Sts. 593.

To the complaint filed by the district attorney, the defendant, by counsel, *demurred*, as follows: *First*. To the jurisdiction of the court as to the person of the defendant, and the subject of the cause of action; and, *second*, for want of sufficient facts stated to constitute a cause of action; which demurrer was overruled by the court below, a decree of forfeiture entered, and the mining ground ordered to be sold as upon executions at law. From which the defendant appealed to this court.

The only question presented in argument, and raised by the demurrer, is as to the authority of the Territorial legislature to enact the law under which this forfeiture was had.

Assuming (as do counsel in argument) that the mining ground in controversy was, and is, a part and parcel of the public domain, had the legislative assembly of the Territory the rightful authority to enact the law now under consideration?

Legislative assemblies, like all other departments of the government, exercise only delegated authority; and any act passed by it not fairly falling within the scope of legislative authority, is as clearly void as though expressly prohibited.

A correct solution of the question before us necessarily leads to an examination, not only of the Organic Act of the Territory, but also of some of the provisions of the constitution of the United States.

It is the right of the legislative assembly to enact laws under the restrictions of the Organic Act and the constitution, and the province of the courts to construe them.

The presumption is always in favor of the validity of such laws, and it is only when there is manifest assumption of authority, and a clear incompatibility between them and the fundamental law, that judicial authority will refuse to execute them. And although it has often been truly said that courts, when called upon to construe laws with respect to their constitutionality, are always treading upon dangerous ground, and that objections to declaring a statute void should ever be listened to with attentive earnestness, yet this duty, which no judge should court, is one from which no judge should shrink.

With this statement of the case and the relative rights and duties of the law-making and law-construing powers, let us proceed to an examination of the question before us.

The 6th section of the Organic Act of this Territory provides "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil."

And by the 3d section of the 4th article of the constitution of the United States it is provided: "The congress shall have power to dispose of, and make all needful rules and regulations respecting the Territory or other property belonging to the United States. * * *"

And again, it is also provided by the 14th amendment to the constitution, section 1: "* * * Nor shall any *State* deprive any *person* of life, liberty or property without due process of law, nor deny to any *person* within its jurisdiction the equal protection of the laws."

Before proceeding to an examination and application of these fundamental principles to the question under consideration, I cannot pass unnoticed, at least to some extent, the able arguments of the respective counsel. The counsel for the appellant urge and insist that the treaty made by the government of the United States with the Empire of China, and approved February 5, 1870, called the "Burlingame treaty," guarantees to the defendant, as well as to all subjects of the Chinese Empire within the United States, the same privileges, exemptions and immunities as are here possessed and enjoyed by American citizens.

The article of the treaty referred to, whereby it is assumed these rights are guaranteed, is article 6 of that treaty (16 U. S. Sts. 740), which provides: "Citizens of the United States visiting or residing in China shall enjoy the same privileges, immunities or exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation; and, reciprocally, Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation."

This provision of the treaty, in my judgment, does not and cannot, by any construction, liberal or otherwise, grant, either to the American in China, or to the Chinaman in America, any greater privileges than are guaranteed by the laws of the respective countries to *other* alien subjects; and this is not only the literal, but the correct interpretation of this provision of the treaty.

Then, *what* rights and privileges are, by the constitution and laws of the United States, guaranteed or granted to *all* aliens? And the answer is found in the various enactments of congress, to which I shall presently refer, and which were passed both before and since the ratification of the "Burlingame treaty," wherein congress not only assumes control over the Territories, but especially provides that *none but citizens* of the United States, or those who have declared their intentions to become such, *shall possess* any of the public domain; and these acts of congress so far have never been repealed.

It is urged, by counsel for the Territory, that, inasmuch as the character of the property in question has always been treated as real estate, and that by the common law an alien could not hold or enjoy the same, within the United States, this principle of the common law, if not directly, at least by implication, has been engrafted into the Organic Act of this Territory, and that therefore the act in question was one of rightful legislation.

It must be observed that the remedy hitherto provided for a violation of this principle of the common law was never such as is attempted in the act under consideration; but the mode of procedure has always been by the general government, through its attorney-general, in the nature of what is termed *office found*,

whereby the alien trespasser was ejected from the premises, which then became *publici juris*, and resort to legislative confiscation and forfeiture were never had ; and if this principle of the common law has in fact been engrafted into the Organic Act, it could have no greater effect than a simple continued recognition of that principle ; but I do not think that, by any known rule of construction, it can even be inferred that any such principle is contained in the Organic Act of this Territory.

When the framers of the great fundamental law of the land provided, "The congress shall have power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States," they did not intend thereby that the congress should delegate that power to some other inferior legislative assembly, else they would have so said. Neither did congress so understand or intend, when it created and organized this Territory, for it is thereby and therein provided, that all Territorial legislation shall be consistent with the constitution and with the Organic Act ; and that no law shall be enacted by the legislative assembly of the Territory in any wise interfering with the primary disposal of the soil.

It is urged, in support of the validity of this so-called "Alien Law," that it is not an interference with the primary disposal of the soil, but that it is only a "rule" or sort of police regulation, regulating the possessory tenures to the public mines ; and that such right so to regulate and rule the same is recognized by the various acts of congress, passed July 26, 1866, July 9, 1870, and May 10, 1872, whereby the mineral lands of the public domain are declared free and open to exploration, occupation and purchase by citizens of the United States, and those who have declared their intentions to become such, under regulations provided by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

These acts of congress do most unquestionably recognize in local legislative assemblies, as well as in properly organized assemblies of miners in their respective mining districts, the authority to regulate the exploration, occupation and purchase from one another of such unoccupied parts of the public mineral domain as

may be within their respective local jurisdictions, so far as the same may be applicable thereto and not inconsistent with the constitution and laws of the United States.

But the *extent* to which these local legislative bodies can regulate these possessory tenures of the public domain seems to be the all-absorbing question to be determined. All that local legislation has done, or may do, can, by the congress, be undone and wholly abrogated. It cannot only do this, but it can repeal *all* laws upon the subject, and enact others in their stead; and I am of the opinion that congress, in assuming control over the Territorial domain under the constitution, and in passing laws regulating the same, has only recognized the right of local legislation, so as to make rules for the amount to be located, the manner of working the same, together with necessary rules to the complete development thereof, and appropriation of the minerals therefrom. And this is the *extent* of recognized local legislation thereon. Any attempt by local enactment, whereby to oust one person from a possessory right acquired under the act of congress granting freedom to the mines without title, and putting another in possession thereof, whether the possession from which he may be ousted be lawful or unlawful, is an unauthorized assumption of power, and void. Such an act, although it may not, in fact nor in fee, dispose of the soil, is nevertheless an interference with the primary disposal of the soil. It deprives the once occupant thereof from holding and working the same, and by its operation pretends to transfer, under judicial proceedings, a once acquired possessory right, whereby the citizen is prohibited and prevented from taking up or entering upon the same, or the government from conveying the same by patent, as otherwise the citizen or government might.

Had the government, after the passage of this act, issued its patent to the defendant for the very mining ground in question, whether authorized or unauthorized, would it not be absurd to claim that the Territorial legislature could assume such superiority over the general government as to cancel or annul it? Certainly not. But this is no more absurd and inconsistent than is the Territorial act itself. That act declares that an alien has not, cannot, and shall not have *any interest* in placer mining ground within

the Territory, and by the same act provide for the forfeiture of that *no interest*, and for a sale and conveyance thereof.

What, I ask, is to be forfeited? What to be sold and conveyed? Simply a *trespass*, and that, too, that was not a trespass to the Territory, nor to any of its property, but if a trespass at all, a trespass upon the lands of the general government, over which the Territory could not exercise any control, for, as I have already shown, such power was *reserved to the congress*, and it has from time to time ever since exercised such control by seemingly proper and legitimate legislation.

Of this reserved power in the constitution I think there can be no doubt. The language used in section 6 of our Organic Act is borrowed from those of the earlier Territories — Dakota, Nevada, Nebraska and Colorado, where it has ever been understood as containing a full reservation of the right of congress over the Territories and the public domain.

So strongly has congress emphasized its power over the public domain that in the acts admitting States into the Union the people are required to agree and declare that *they forever disclaim any right or title to the unappropriated lands within the Territory*. See for instance the enabling act of Nebraska, approved April 19, 1864.

If, then, a *State* cannot control or interfere with the disposal of the public lands within its boundaries, nor deny to any person within its jurisdiction the equal protection of the laws (although congress may, and has), much less can a Territory.

I am therefore of the opinion that the said act, entitled "An act to provide for the forfeiture to the Territory of placer mines held by aliens," is inconsistent with the Organic Act of the Territory, repugnant to the constitution of the United States, and therefore void.

KNOWLES, J., dissenting. I cannot agree with the majority of the court in this case, for the following reasons:

When a citizen of the United States locates any portion of the public domain, containing precious metals, in accordance with the local rules and regulations of miners, the government of the United States becomes divested of an easement in that particular

portion of the public domain, and such locator becomes the owner thereof. To the extent of this easement, that parcel of mining ground ceases to be public domain. The government has parted with the title to this extent, and a citizen has acquired it. This court has held this view in the case of *Robertson v. Smith*, 1 Mon. 410.

To the extent of this easement, I do not see that any portion of mining land, so acquired, is any more public domain than a section of agricultural land for which the general government has given a patent to a pre-emptor. It is true, all the title, except this easement, is in the general government, and to that extent and no more it is public domain. In the opinions of my brother judges, they, in effect, say, that the paramount title to mineral ground, although the same may be properly located, is still in the general government. When a person has parted with a title to land, how can he be said to have the paramount title still to it?

This court, in the case above referred to, held, that when mining ground was properly located, the government parted with the title to an easement in the same. How then can it be maintained that the government still has the paramount title to this ground so far as this easement is concerned?

There appears to have been an impression, on the part of my brother justices that, should the Territory forfeit and sell this easement, the purchaser would acquire a greater interest in the land than the first locator of the mine. This is not so, however. He would take only a mining easement, and he would take this subject to the conditions, the mining rules and regulations attached to the estate, namely, the conditions of forfeiture should he fail to comply with them. Again, it is claimed that this law under consideration interferes with the primary disposal of the soil. What is understood by the phrase "primary disposal of the soil?" The disposal of it by the general government, nothing more. But when mines are duly located, the government has disposed of the ground containing them to the extent of an easement. All the law under consideration proposes to do is to forfeit this easement. How then can this law interfere with the primary disposal of the soil, when to the extent this law affects the

soil the government has already disposed of it? The chief justice, in his opinion, holds that a forfeiture of land conveyed to an alien can only be made to the sovereign power in the State. And he claims that the Territory of Montana has no sovereignty, but that all the sovereign power within its borders is vested in the general government of the United States, and hence that this government is the only one that can claim forfeiture of real estate sold to an alien. I know that there has been a good deal of talk about a Territory not being sovereign, but this is the only legal opinion of which I have any knowledge that so decides. All of the decisions in relation to organized Territories speak of them as governments. Our Organic Act calls this a temporary government. Let us see what this government is. It has an executive department, a judicial department and a legislative department. What powers are vested in each?

The executive power is vested in a governor. It is provided that he shall be the commander-in-chief of the militia of the Territory; he may grant pardons and respites against the laws of the Territory; he shall commission all the officers of the Territory who shall be *appointed* to office under the laws thereof; he shall take care that the laws be faithfully executed, and possesses the veto power. Are these not attributes of sovereignty?

The legislative authority is vested in a governor and a legislative assembly. The legislative power extends to all rightful subjects of legislation consistent with the constitution and laws of the United States, and the provisions of our Organic Act. It has, under such a grant, power to provide for the levying and collection of taxes; to pass laws for the punishment of all crimes and misdemeanors; to regulate domestic relations; to regulate the conveying and tenure of property; to regulate and give the power of transmitting by devise and wills, and the distribution of estates among heirs. It has the power to organize the militia of the Territory, and to provide for calling the same to suppress insurrection against the laws of the Territory, to repel the invasion of hostile Indians into the settled portions of the Territory, and even to repel the invasion of a foreign power invading its limits. Other powers might be enumerated. I do not think any State legislative authority in the Union has a more extensive grant of

legislative powers. One further point may be noticed that will show more fully the extent of the power of our legislative department, and the character of our Territorial government, namely, the legislative authority may grant a charter to a municipal corporation. This right has never been doubted. The city in which this court is now sitting has a charter of incorporation granted by the legislative department of the Territory. If the government of this Territory was but a municipal corporation, similar to that of a city government organized by a State legislature, could it possess such powers? Can a municipal corporation create a municipal corporation? The legal decisions of the past may be searched in vain for authority to sustain the exercise of such powers by a municipal corporation. It may be that since the amendment to our Organic Act, the power to charter corporations has been somewhat limited. If the legislative authority of the Territory did formerly possess the power to charter corporations to as unlimited an extent as a State, what was the necessity of that amendment?

The judicial power of the Territory is vested in a supreme court, district courts, probate courts and justices of the peace. The jurisdiction of these courts is as limited by law; that is, by the laws of our legislative authority. It is also provided that the said supreme court and district courts shall possess chancery as well as common-law jurisdiction. What more extensive judicial powers are vested in any State government in the Union? We have a government then, I hold, with an executive, who possesses, in almost every essential particular, the same powers as the governors of the several States in the Union. We have a legislative assembly that enacts laws, not by-laws, and whose legislative power is not surpassed by the legislative authority of any State government. We have a judicial power, as extensive as any State, vested in courts, whose authority to enforce their judgments and orders is full and complete, and whose judgments would undoubtedly have the same force and effect in a foreign nation as those of any State in the Union, and would have the same force in any State as the judgments of another State, were it not for the provisions of the national constitution. Yet it is held that, because all these powers are granted to our government

by an act of congress, it does not possess sovereignty. What does invest a government with sovereignty but the possessing and exercising of sovereign powers. Does it make any difference from whence sovereign powers are derived, whether from God, as claimed by kings, or from the people, as claimed by republics, or from a government possessed with the sovereignty over a country, as the United States has over the Territories? The United States government has only such sovereign powers as the people have granted or delegated to it. It does not claim to have received any power from a Divine source. Is it not sovereign? But it may be said that these powers are granted or delegated in perpetuity. Not so; there is a right reserved to amend our national constitution, and by virtue of this right, any sovereign power it now possesses may be taken from it. But suppose these sovereign powers are granted to the national government in perpetuity, and the sovereign powers bestowed upon a Territory are given temporarily. Can it be a safe rule to follow, in determining whether or not a government is sovereign, the ascertainment of whether the powers it possesses were given it in perpetuity or temporarily. There is no reason in such a rule.

If any government in the limits of the United States can be said to possess sovereignty, it must be because it has and exercises sovereign powers. It is said that the general government may divide our Territory or attach it to a State or another Territory. The general government reserved this right in our Organic Act. If a reservation in an Organic Act prevents a government from being sovereign, then the United States government is not sovereign, because there are reservations and limitations in our national constitution. And it might be pertinent to inquire, why was it thought necessary to put these reservations in our Organic Act? I cannot see how a reservation in an Organic Act prevents the sovereign attributes possessed by the government it organizes from being attributes of sovereignty, and that government, to the extent of these sovereign powers, from being sovereign, unless it takes something more than the rightful possession of sovereign powers to make a government sovereign. Again, it is said the general government might sell our Territory. This power may be doubted. But admit that it can sell its power of eminent

domain, can it sell the government called the temporary government of Montana Territory? That is what I claim possesses sovereignty. Can it sell the sovereign powers it has granted to this government? Can it farm out its executive, legislative, or judicial departments? If so, it is fortunate, perhaps, for our people that public virtue is so pure and exalted. I think my brothers, finding that our Territorial government is lacking in some of the attributes or prerogatives generally found possessed by sovereign powers, have shut their eyes to the sovereign powers it does possess and found no sovereign powers reposed in it. But such a rule would find that, because the Queen of England did not possess as many sovereign powers as King William of Prussia, or the Czar of Russia, therefore she has no sovereign powers. The Territory of Montana having sovereign powers, I hold that, to the extent of these, she is sovereign; that in determining whether or not a government in the United States is sovereign, we should not look to the source of its powers or to their extent or duration, but to their possession. The right of congress to grant to Territorial governments the powers they possess has been acquiesced in by all the national courts. And they seem to have based this right upon the proposition that the United States is vested with sovereignty, as far as the Territories are concerned, just as, primarily, all sovereignty was vested in the people of the United States, and that as the people could grant the sovereignty they possessed to the National and State governments, so could the United States grant its sovereignty save as to national matters to the Territorial governments. Whether or not this theory was based upon sound judicial principles in the start, it is not pertinent now to inquire. The general government has acted upon this theory so long that it is undoubtedly now the law.

Mr. Justice STORY, in his work on the Constitution, says: "Having a right to erect a Territorial government, they may confer on it such powers, legislative, judicial and executive, as they may deem best. They may confer upon it general legislative powers, subject only to the laws and constitution of the United States."

Again, in speaking of the courts created for a Territory, he

says: "They are legislative courts, created in virtue of the general right of sovereignty in the government, or in virtue of that clause which enables congress to make all needful rules and regulations respecting the Territory of the United States." 2 Story on Const., § 1325.

Judge KENT, in his Commentaries, says: "With respect to the vast Territories belonging to the United States, congress have assumed to exercise over them supreme powers of sovereignty." 1 Kent's Com. 384.

In the noted case of *Dred Scott v. Sandford*, all of the judges agreed that, from some source, congress had the power to form GOVERNMENTS in the United States Territory. The only dispute between the chief justice and myself upon this point is, as I understand it, as follows: He holds that congress or the United States has sovereign power over a Territory, and that this sovereignty it has not or cannot delegate or grant to a Territorial government; while I hold that all the sovereign powers a Territorial government possesses were primarily reposed in the general government, and that these it has granted to it. If it is claimed that the delegating or granting of sovereign powers to a government does not make it a sovereign power, then I answer that the government of the United States and the governments of the several States have no sovereignty, because it is an accepted theory of our government that the people are sovereign, and have granted or delegated to our governments some of their sovereign powers.

Our Territorial governments have powers similar to those which the English colonies in America that had charters, possessed. Mr. Justice BLACKSTONE describes them as "in the nature of civil corporations, with the power of making by-laws for their own internal regulations, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation. They have a governor, named by the king (or, in some proprietary colonies, by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king and council here in England. Their general assemblies, which are their house of commons, together with their council

of state, being their upper house, with the concurrence of the king, or his representative, the governor, make laws suited to their own emergencies." 1 Black. Com. 108.

Mr. Justice STORY, in his Commentaries on the Constitution, says of this description, in § 161: "This is by no means a just or accurate description of the charter governments. They could not properly be considered as mere civil corporations of the realm, empowered to pass by-laws, but rather as great political establishments or colonies, possessing the general powers of government, and rights of sovereignty, dependent, indeed, and subject to the realm of England; but still possessing within their own Territorial limits the general powers of legislation and taxation."

Again, speaking of the charters given to Massachusetts, he says: "But the charter of William and Mary, in 1691, was obviously upon a broader foundation, and was, in the strictest sense, a charter for general political government, a *constitution for a State, with sovereign powers and prerogatives and not for a mere municipality.*"

He proceeds then to state what the powers given under this charter were, and they are certainly not greater than those possessed by our Territorial government. In pursuing the subject of the governments organized for the chartered American colonies, it will be found, I am sure, that in the main our Organic Act was borrowed from the provisions of the charters of the New England colonies. They are too similar to leave any other conclusion than that the provisions of the former were suggested by the provisions of the latter; and it should be remembered that these chartered governments were organized by an authority that claimed, and who, it was acknowledged, possessed as unlimited a sovereignty over the colonial dominions, as the United States can be said to possess over the Territories of the United States.

Judge DILLON, in his work on Municipal Corporations, speaks of the free cities of Italy and the hanse towns of Germany, which arose during the "middle ages," and classes them as States, and treats of them as something more than civil corporations having power only to pass ordinances or by-laws. In Hallam's "Middle Ages," it is said of these hanse towns: "They were tacitly ac-

knowledge to be equally sovereign with the electors and princes.' Yet the governmental authority possessed by these towns was derived from the rulers, who possessed sovereignty over the country in which they were located. These cities certainly exercised sovereign rights and were treated as capable of entering into treaties and leagues.

The American colonists thought themselves capable of entering into leagues and compacts. Whatever may be said of the power of the general government over the Territories, its right to divide them, to sell them, or to repeal their Organic Acts, may also be said of the power the king of England claimed to exercise and often did exercise over the chartered American colonies, and of the power of the sovereigns in whose realm were located the hanse towns of Europe. Yet it will be found that it has always been claimed that to a certain extent those colonies and those towns were sovereign.

Holding then, as I do, that the Territory of Montana is a government possessing many sovereign powers, or in other words, possesses sovereignty, I come to the question, whether its legislative authority has the power to provide for the forfeiture of land held by aliens to the Territorial government. It is conceded that our legislative power, having adopted the common law, so far as applicable, an alien cannot hold the title to real estate in this Territory; in other words, that that portion of the common law that provides that an alien cannot hold the title to land in a country of which he is not a citizen is applicable. And it may be remarked that there is no law of the United States to this effect, that I am aware of, and that it is only by virtue of this adoption of the common law in this Territory that this disability is imposed outside of the statute under consideration. It follows then that our legislative power can impose this disability. If it can do it in a round-about way, namely, by the adoption of the common law, it can do it directly. What was the object of creating this disability at common law?

Blackstone (1 Com. 372) lays down the rule and reason for it: "An alien born may purchase lands, or other estates; but not for his own use, for the king is thereupon entitled to them. If an alien could acquire a permanent property in lands, he must owe

an allegiance, equally permanent with that property, to the king of England, which would, probably, be inconsistent with that which he owes to his own natural liege lord ; besides that, thereby the nation might, in time, be subject to foreign influence, and feel many other inconveniences." Chitty, in his note to this passage, says: "A political reason may be given for this, which, I think, stronger than any here adduced. If aliens were admitted to purchase and hold lands in this country, it might, at any time, be in the power of a foreign state to raise a powerful party amongst us ; for power is ever the concomitant of property." And he proceeds to show how Russia resorted to this very means of acquiring large estates in Poland in furtherance of its covert design, which subsequently became manifested, of conquering and dismembering that now unhappy country. As I hold that our Territory has the power to suppress insurrection against its laws, to provide for calling out the militia therein, to repel the incursions of hostile Indians into our settlements, or to repel the invasion of any hostile foe who should come within our Territorial limits, I am confident that it does possess the much less power of enacting laws so that no foreign power would be able to raise up a party within our borders hostile to the authority of our government. It may be said that it is no part of the powers vested in a Territory to protect itself against a foreign enemy, and that this power is vested, by the constitution, in the general government. It has just as much power upon this point as any State in the Union has ; and can it be maintained that a State cannot raise troops and marshal them against a foreign foe as well as a domestic one that would seek to conquer and subdue it ? To assert that any government cannot do this is to deny the right of self-protection. The States in this Union have ever claimed the right to forfeit the title to real estate purchased by aliens within their borders, and the general government never has exercised that right. The truth is, it makes but little difference upon what grounds the right is based, for the fact is that all *governments* have claimed this right. It is considered a concomitant of government ; a necessary power. Again, the forming of Territorial governments had, for one of its objects, the building up of a body politic that would eventually be competent to be admitted into

the Union as a State. Now if, in carrying out this object, it is found that a foreign and alien population that the laws of the national government will not allow to become citizens, or an alien population, who, from disinclination, or hostility to our institutions and government, refuses to become citizens, were acquiring such permanent interests in the Territory that they would hinder the settlement of desirable citizens of the United States, and prevent the organization of such a political community as would hinder us from becoming a State in the American Union, it certainly ought to be a rightful subject of legislation, the prevention of this acquisition of such property.

I have treated this subject thus far as though the property vested in an alien must be forfeited to a sovereign power. True, in England, the estate was forfeited on "office found" to the king, in whom is vested the sovereignty. In this country we have no king, and our governments to some extent take the place of kings. It was a provision of the common law that made the forfeiture of such estates to the king. We claim the right to change the common law on most every other subject. Why not upon this? Our legislative authority upon all subjects applicable to our condition, adopts and changes and repeals the common law. This is generally admitted to be within its powers. It ought to have the right to repeal the common law that made the estate vested in an alien subject to forfeiture to the crown, and enact that it should be made to itself, even if it has no sovereignty, for it certainly has the same right of self-protection that a sovereign power has. The question of to whom the forfeiture shall be made is certainly the subject of law. It is not above legislative enactments. I do not think my brother justices would hold that congress might not pass a law saying that the forfeiture need not be made to any sovereign power, but even might be made to a Territory, although it possessed no sovereignty, or to a county. This only shows that this matter is a rightful subject of legislation. And I am unable to see how such legislation interferes with the constitution of the United States, its laws, or the Organic Act of our Territory, or is not a rightful subject of legislation, and these are the only limitations upon our legislative authority. Congress has delegated to the legislative power of the

Territory the right to legislate upon all rightful subjects of legislation. States legislate upon this subject. Congress may. It is certainly a rightful subject of legislation then. It seems to be contended, however, that the forfeiture cannot be made to the Territory, for the reason that the Territory cannot take the title to real estate. Our legislative authority passes laws authorizing counties to hold real estate for the purposes of court-houses and jails, and school districts, real estate for the purposes of erecting school-houses. Undoubtedly the Territory could buy real estate for the purposes of a Territorial capitol, or for erecting a Territorial college, or for any other purpose that was a legitimate object of government. And it has ever been contended by the English government, and the State governments of this Union, that it is a legitimate province of government to take the forfeiture of real estate vested in aliens, to prevent a foreign power from acquiring the ownership of permanent property in the country. The Territory of Montana, I repeat, is a government, and has the same rights of self-preservation as any other government. It is contended that the forfeiture must revert to the grantor. This is not law, "for the vendor is not affected by it, he having resigned his right, and received an equivalent in exchange," is the language of Justice BLACKSTONE (Book 1, page 372). The doctrine of this court, as I have before shown, is that the general government has parted with this easement, known as a mining claim in this case, and because it has become vested in an alien, it does not re-invest in the general government. There is no law that authorizes such a rule. And to show that this is not the law, I have but to state that in the "Western States," where the general government once owned the title to all the real estate, forfeitures are claimed and exacted by the States where real estate becomes vested in an alien. If property conveyed to an alien was held by him for the benefit of the original grantor, this would not be the case. The general government, as to its title to lands, is considered only as an individual proprietor.

In this discussion, I have only contended for the right of the Territorial legislative authority to pass a law forfeiting real estate acquired by an alien to the Territory. I do not think it necessary to examine the law under consideration, to see whether it

properly provides for such a forfeiture. My opinion is that it does. The majority of the court have based their judgment upon the ground mainly that the legislative power does not extend so far as to provide for such a forfeiture. I have contended that it does, and that it is a rightful subject of legislation. And I believe that time will fully demonstrate the benefits that would have accrued to this Territory had such legislation been sustained.

NOTE. — The act of the legislative assembly, entitled "An act to provide for the forfeiture to the Territory of placer mines held by aliens," approved January 12, 1872, was repealed by an act approved January 15, 1874. Sts. 8th Sess. 97. — REP.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

AT THE
AUGUST TERM, 1874, HELD IN VIRGINIA CITY.

Present:
HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. FRANCIS G. SERVIS, }

RADER, respondent, *v.* NOTTINGHAM, appellant.

ORDER TAXING COSTS NOT APPEALABLE. A party cannot appeal to this court from an order of the court below, taxing costs.

CASE AFFIRMED. The case of *Wilson v. Davis*, 1 Mon. 98, holding that the consent of parties cannot confer jurisdiction upon this court, affirmed.

Appeal from First District, Jefferson County.

SHOBER & LOWRY and PAGE & COLEMAN, for appellant.

CHUMASERO & CHADWICK and G. G. SYMES, for respondent.

KNOWLES, J. The notice of appeal in this case is as follows:

“ To the above plaintiff, or A. G. P. George, G. G. Symes and Chumasero & Chadwick, his attorneys:

“ You will please take notice that the defendant in the above-

entitled action hereby appeals to the supreme court of the Territory of Montana, from the order made and entered in said cause in the said district court, and on the 11th day of April, A. D. 1873, taxing plaintiff's costs made in said district court to this defendant, and from the whole and every part of said order or judgment."

The only construction I can put upon this notice is, that it shows the intention of the appellant was to appeal from the order only taxing the costs incurred by the plaintiff in the trial in the district court to the defendant.

The order taxing costs is not one that may be appealed from the district court to the supreme court. Sections 369 and 380 of the Civil Practice Act provide what orders or judgments are the subject of appeal. Upon an inspection of these, it will be found that an order overruling a motion to tax or retax costs is not one of them. The appellate jurisdiction of this court is such as is limited by the laws of this Territory, and any person desiring any ruling of a district court reviewed in this court must comply with the regulations of our statutes. As there can be no appeal from the order described in the notice of appeal, this court has no jurisdiction of the question thereby presented. In the case of *Levy v. Getleson*, 27 Cal. 688, in regard to such an order as this, the court holds this language:

"The order appealed from is not, in itself, appealable, inasmuch as it was not made after final judgment. * * * * We cannot approach the alleged error through an appeal from a non-appealable order."

In the case of *Lasky v. Davis*, 33 Cal. 677, the same court says:

"An order made on a motion to retax costs is not appealable. It is not an order made after final judgment, within the meaning of section 343 of the Practice Act, even though it be made after the entry of judgment; for, in legal effect, the order, if the motion is granted, amounts to a modification or amendment of the judgment, or, in other words, becomes a part of it. If the motion is denied, the error is none the less in the judgment, and can be reviewed only upon an appeal from the judgment."

The statutes of this Territory upon this point are the same as in California. It is true that in the briefs in this case, the point here raised was not presented. This can make no difference, how-

ever. If it is not an appealable order, consent will not give this court jurisdiction of the question it presents. The general rule is that consent will not give a court jurisdiction of a subject-matter.

Wilson v. Davis, 1 Mon. 98; *Hopper v. Kalkman*, 17 Cal. 517; also, *Brooks v. Calderwood*, 19 id. 124.

In this last case the court said: "As no appeal lies from the order refusing to transfer the cause to the circuit court of the United States for trial, this court has no jurisdiction to pass upon the merits of the application of the defendant, even with the stipulation of the parties."

In this case just cited, there was a stipulation filed by the parties to submit the case on its merits. Holding, as we do, that we have no jurisdiction to determine the issue presented in this appeal, any judgment or order that we might render thereon would be void. Not desiring to cumber our records with a void judgment or order to vex the court below with, we must dismiss this appeal on our own motion.

Appeal dismissed.

JOHNSTON, appellant, v. LEWIS AND CLARKE COUNTY, respondent.

RIGHT OF PRISONER TO COUNSEL. The 6th article of the amendments to the constitution of the United States has abrogated the rule of the common law by which a prisoner was not entitled to appear by counsel.

COMPENSATION OF ATTORNEY APPOINTED BY COURTS. An attorney who has been appointed by the district court to defend an indigent prisoner charged with the commission of a felony, is required to perform this duty; but he cannot recover compensation for his services from the county in which the trial occurs.

COUNTY FUNDS. Money can only be drawn from the treasury of a county in pursuance of the statute.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J., upon an agreed statement of facts.

E. W. TOOLE and CHUMASERO & CHADWICK, for appellant.

There is only one question in this case—the liability of re

spondent to pay an attorney for services in defending a prisoner by order of the court. The law makes it the duty of the court to assign a prisoner counsel when he is unable to employ an attorney. Cod. Sts. 220, § 196; 6th Amend. U. S. Const.

An attorney must perform this duty. If he refuses, the court can punish him for contempt by fine or imprisonment. *Hall v. Washington County*, 2 Iowa, 473.

A special tax is imposed upon appellant if he is not entitled to compensation. With equal justice others should be compelled to furnish the necessities of life to paupers gratuitously.

Respondent should pay for appellant's services. *Webb v. Baird*, 6 Ind. 13; *Dane v. Smith*, 13 Wis. 585. These cases are directly in point.

Respondent relies on *Rowe v. Yuba Co.*, 17 Cal. 61. The statute of California is different from that of Montana. No authority is referred to in the opinion, and the reasons which are stated are unsound. If it is regarded applicable to this appeal, it is not a safe precedent.

Is it right to make an attorney work for nothing? Does he pay a license for this privilege?

J. K. TOOLE, District Attorney, Third District, and SHOBBER & LOWRY, for respondent.

It is the duty of the court to assign counsel for certain prisoners, but it is not authorized to employ attorneys. Cod. Sts. 220, § 196.

No provision has been made for the payment of appellant's services, and the county cannot pay for them. Cod. Sts. 435, § 14. There is no contract between appellant and respondent, and there is no obligation to pay by respondent. *Case v. Shawnee Co.*, 4 Kan. 511; *Rowe v. Yuba Co.*, 17 Cal. 62.

The cases cited from Indiana and Wisconsin by appellant are inapplicable. These decisions are based upon a provision of the constitutions of these States. In Indiana the constitution provides "that no man's particular services shall be demanded without just compensation." Art. 1, § 21. The statute requiring an attorney to perform gratuitous services is in conflict with this section.

SERVIS, J. The agreed statement of facts in this case presents only one question for our determination, namely, the liability of a county to pay the reasonable fee of an attorney at law assigned by the court to defend an indigent prisoner charged with a felony.

It is conceded that the only statute upon this subject in this Territory is that of section 196 of the Criminal Practice Act (Cod. Sts. 220), which provides: "If any person about to be arraigned upon an indictment for felony be without counsel to conduct his defense, and he be unable to employ any, it shall be the duty of the court to assign him counsel, at his request, not exceeding two, who shall have free access to the prisoner at all reasonable hours."

The claim of the plaintiff is, that by virtue of the provision of this law, coupled with that provision contained in the sixth article of the amendment to the constitution, which provides, that such accused person shall "have the assistance of counsel for his defense;" and that by virtue of his being an attorney at law, and thereby an officer of the court, and his compulsory obligation to defend a prisoner when assigned by the court, he is entitled from the county to a reasonable moneyed compensation therefor.

With respect to the duties of attorneys and solicitors in courts of justice, they are, and always have been, for many purposes, deemed *officers* of the courts in which they are permitted to practice; and although their duties and liabilities are necessarily subject to local laws and rules of particular places and particular courts, yet the bar of the United States, generally, is subject to the same principles and doctrines of common law applicable to their brethren in England; and in England an attorney, though an officer of the court, could not generally be compelled to appear or act for any one, unless he had voluntarily undertaken so to do, or accepted a retainer. But in some cases the courts there have had and exercised the power to assign an attorney for indigent persons in civil suits, and a case is recorded of the court of queen's bench having assigned to a suitor in indigent circumstances an attorney who had previously refused to act for him. *Treverman v. Anon.*, 12 Mod. 583. But not so in criminal cases, for at common law a prisoner was not entitled to appear by counsel at all; and the provision in our constitution, which gave him permission to be assisted

by counsel in his defense, was only intended to abrogate that established doctrine of the common law, or, at farthest, to no more than lay a predicate for rightful legislation as to compensation in such cases, and indeed, in some States, the legislature has not only made it the duty of the court to assign counsel for indigent prisoners, but have fixed either the mode or amount of compensation for their services; and in the State of California, the legislature has only provided, that the court shall advise such prisoner that the common law is not in force in this respect, but that it is his right to be assisted by counsel in his defense, if he shall so desire.

We have been unable to examine many of the authorities cited by counsel for appellant, for the reason (as is too often the case) that they were either not within their command, or removed to their offices or elsewhere after being cited. The only authority cited by plaintiff, which we have had an opportunity to examine, and which, upon argument, seemed to be the most favorable to the plaintiff, is the case of *Hall v. Washington Co.*, 2 Iowa (Green), 473, which is somewhat elaborate, and by no means void of legal acumen; and the learned judge in that case concedes (as it must be in this) that the statute being silent as to the compensation, the question thereof must be disposed of upon the principles of the practice of the common law; but he fails to cite any authorities at common law in support of the proposition of the right of the court or of the county commissioners to *create* any liability against a county. His reasoning is, that when a duty is enjoined by statute, the means for enforcing it are necessarily implied. This is too broad a construction to be given to a statute borrowed, as ours seems to be, from States where it was deemed necessary to provide for compensation in such cases. If such were the law, why legislate at all upon the subject of fees or compensation to any of the officers of the court? Why not let the court or the board of commissioners fix the amount or rate of fees in each case, and thereby *create* an indebtedness against the county? And the answer to this is: That, in this respect, the legislative branch of the government has undertaken to regulate the creation of such liabilities, and it has regarded the courts and the commissioners, in this respect, as mere creatures of their statutory powers.

When courts order processes and papers to be issued and served their ministerial officers must obey, and for this certain compensation is fixed by statutory law. Other orders are often made by courts upon their ministerial officers necessary to the due administration of justice, which they are compelled to and do obey, and for which, in many States, no compensation is fixed by law. Yet they must perform them without charge, unless provided by statute, and if the statute has not conferred the right to compensation, the court has it not by implication, and cannot enforce it, for that would be but to violate the law, instead of enforcing it.

It therefore follows, that as the claim of the plaintiff was not a debt created by any express authority of law, it could not be created either by the court or the commissioners, as they were but mere creatures of the statute, and therefore it was not created at all as against the county, and if created at all, it was against the defendant — the prisoner he defended; and this view, we think, is fully sustained in the case of *Rowe v. Yuba Co.*, 17 Cal. 61.

This may seem, as it in fact does, to impose unequal burdens upon the legal profession, which, however, can be readily remedied by the legislative tribunal, the rightful and only power to correct the evil complained of.

The law, for all time, has enjoined such seeming burdens upon the legal profession, and that, too, in times when, to attain such distinction, was attended with greater difficulty than at the present day; and the performance of such duty was then acquiesced in without, at least, recorded murmur; compensated only with the honor of obedience to the law, the faithful performance of duty, and that of being an honored member of a profession, which, upon the roll of illustrious men who have figured in the annals of our Union, has inscribed some of the brightest names, whose labors are enduring monuments upon the broad field of the law which they have cultivated and adorned. By their official position they have been and undoubtedly will continue to be placed at the most important posts of our political system as sentinels upon the past, present and future battlements of the law; a castle whose dome overhangs the fundamental interests of civil society. Although their number may, perhaps, be so great as scarcely to afford an adequate distribution to each, yet all are

made, by virtue of their professional office, conservators of public order, the guardians of right, the enemies of wrong, and the probators to whom appeal is made in cases of exigency. And this, no doubt, was the view taken of the rights, duties, and liabilities of the legal profession by Chief Justice FIELD in the 17th of California Report, above cited, wherein he says: "It is part of the *general duty* of counsel to render their professional services to persons accused of crime who are destitute of means, when not inconsistent with their obligations to others; and for compensation they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law."

The judgment of the court below is affirmed, with costs.

Judgment affirmed.

WADE, C. J. The plaintiff in this case, who is an attorney at law, having been assigned by the court to defend a prisoner in indigent circumstances, in pursuance of the statute, and having so defended the prisoner, presented the account for his services, in this behalf, to the board of county commissioners of Lewis and Clarke county, requesting the board to allow the account, and draw him an order on the county treasury, in his favor, to pay the same. The board disallowed the account, and refused to draw the order requested, whereupon an agreed case was made and taken to the district court, where the decision of the board was affirmed, the account disallowed, and judgment rendered for defendant, from which judgment the plaintiff appeals to this court.

The statute provides that it shall be the duty of the court to assign counsel to defendants in certain cases, of which this case is one; and the plaintiff rests his case against the county upon the theory that, when the law requires a service to be performed, the presumption necessarily arises that compensation shall be awarded therefor, and that no service can be required unless payment is provided. This would be a forcible proposition to urge before a legislature whose province it is to make laws, but before a court the law must be taken as it is, and not as it ought to be.

The statute *does* require the service, and it *does not* provide

any means for payment. Money can *only* be drawn from the county treasury in pursuance of the statute, and as authorized by law, and any order drawn on the treasury without this authority is void. There is no statute in the Territory authorizing courts to order attorneys to be paid from the county treasury for services rendered in defending prisoners; there is no statute authorizing the board of commissioners to draw an order on the treasury in payment for such services; and there is no statute authorizing the county treasurer to pay for such service; and in the absence of authority it would be simply judicial legislation, or worse, for the courts to open the door of the treasury to any demands not authorized by law.

We readily assent to the proposition that no man should be required to perform service without just compensation therefor, but it is the duty of the legislature, and not the courts, to enact such laws as will secure this end.

NOTE.—The case of *Rowe v. Yuba County*, *supra*, was affirmed in *Lamont v. Solano County*, 49 Cal. 158.—REP.

FULTZ, respondent, v. WALTERS, appellant.

CERTIFICATE OF DEPOSIT — *delivery — remedy for non-payment.* W., as agent for F., deposited money in a bank and took a certificate of deposit, payable to his own order, three months after date. W. delivered the certificate to F., but refused to make a written indorsement thereon to F., and the bank refused to pay F., the owner and holder. *Held*, that said certificate is negotiable, and may be assigned by delivery without any writing. *Held*, also, that F. has a legal remedy against the bank, and cannot maintain a bill in equity to compel the payment of the certificate after W. has indorsed it. *Held*, also, that F. can maintain a bill in equity to compel W. to indorse said certificate to F.

DEMURRER FOR MISJOINDER. A demurrer for the misjoinder of parties defendant, which does not show wherein there is such misjoinder, will be overruled.

DEMURRER FOR WANT OF EQUITY. A demurrer upon the ground that the complaint does not show sufficient equity to charge a party cannot be made under the specification that there is a misjoinder of parties.

Appeal from Third District, Lewis and Clarke County.

WADE, J., sustained the demurrer to the complaint.

JOHNSTON & TOOLE, for appellants.

Respondent has always been the owner of the certificate of deposit, and has a complete remedy at law. *Welton v. Adams*, 4 Cal. 37; *Morse on Banks*, 52.

At common law the instrument sued on is a promissory note. *Morse on Banks*, 53, 54. It is negotiable by the laws of this Territory. *Cod. Stats.* 385, § 1.

The delivery of the certificate with the intention of passing the title of the holder entitles the party to whom it is delivered to maintain an action at law in his own name upon the same. *Prescott v. Hull*, 17 Johns. 284; *Taaffe v. Rosenthal*, 7 Cal. 514; *Baker v. Bartol*, id. 551.

If respondent is a *cestui que trust*, he is the real party in interest, and can maintain the action at law against the bank, and join the trustee with him, if necessary. *Lomme v. Sweeney*, 1 Mon. 584. The trustee may be made a party by the court, upon his application. *Civ. Pr. Act*, §§ 17, 18, 599.

Respondent must pursue his legal remedy.

SHOBER & LOWRY, for respondent.

No brief on file.

KNOWLES, J. The issues in this case are presented by the complaint of the respondent and the demurrer of the appellant. It is an action in equity. The facts set forth in the complaint are to be taken as true. The demurrer admits them. The complaint shows that James Walters, as the agent of Joseph Fultz, deposited in the First National Bank of Helena \$3,100, and took a certificate of deposit in his own name from said bank therefor; that the certificate of deposit is now in the possession of Fultz, but that Walters has refused, and still refuses, to make a written indorsement of the same to him, and that said bank refuses to pay the same, for the reason that the said certificate is not indorsed to him, Fultz. The object of the action is to compel the said Walters to indorse this certificate of deposit to Fultz, and, should he fail to do so, that the court appoint a commissioner to make the same; and further that the said bank, when the indorsement shall be made, shall be compelled to pay the said certificate. The de-

murrer was to the point that the complaint did not state equity sufficient to charge the bank. The court overruled the demurrer. The first point we will consider. Does the complaint state facts sufficient to warrant the court in giving the relief demanded against the bank? A certificate of deposit made in the form of the one presented in this action is in effect a promissory note. It is made payable to the order of Walters, three months from date. Morse on Banks, 53, says of instruments of this character: "They have been held to be in fact equivalent to promissory notes. Usually they embody an express promise in terms to pay, but even if they do not, they are yet the bank's acknowledgment of its indebtedness, and so are of the same effect as if they expressly promised payment. Substantially they resemble promissory notes, and the courts have always inclined to regard them as such, especially when they are made payable otherwise than immediately and upon demand. If they are payable at a future day certain, they are simply promissory notes, neither more nor less."

Upon the same subject, Parsons on Notes and Bills (vol. 1, p. 26), says: "There has recently been considerable discussion as to the nature of the instrument in common use among bankers, called a certificate of deposit. It is usually in this form: 'I hereby certify that Mr. A—— has deposited in —— bank \$1,000, payable twelve months from date, to his order, upon the return of this certificate. (Signed) B, Cashier.' We think this instrument possesses all the requisites of a negotiable promissory note; and that seems to be the prevailing opinion." See, also, to the same effect, *Miller v. Austen*, 13 How. (U. S.) 218. Being a promissory note, this certificate is negotiable. The bank then had no interest in the relief asked against Walters, the indorsement of the same. And it may be needless to remark that this is the only equity presented in the bill for which the plaintiff asks relief. I think also that the plaintiff had a speedy and adequate remedy at law against the bank without the indorsement prayed for. The complaint shows that Fultz was the holder of the said certificate, and the real owner of the same. Walters had delivered it to him, and claimed no interest therein. A note may be transferred by assignment as well as by indorsement. And it is not necessary that such assignment should be evidenced by writing. Upon the subject of the

assignment of promissory notes, see 2 Pars. on N. & B. 44-54. In this discussion, he lays down the rule: "A note of hand, or a bill of exchange, being, as we have said, *itself* only a personal chattel, although called and regarded for most purposes as a chose in action, may be assigned by delivery only, without any writing upon it, or on another paper."

The delivery of the certificate to Fultz under the circumstances that appear in the complaint was an assignment of the same. Fultz alleges that he is the holder and owner thereof, and that Walters claims no interest therein. The fact that the certificate was made payable to the order of Walters makes no difference. Promissory notes, made payable to order, may be assigned as we have seen by delivery. The words "payable to order" made it negotiable, and made it subject to the incidents which attach to negotiable paper. The words "payable to order," in a promissory note, do not amount to a contract that the payor is only to pay the same when it is indorsed properly by the payor. He is liable to an assignee, as well as to an indorsee. Under our statute, Fultz being, as he avers, the owner and holder of this certificate, could bring an action thereon in his own name against the bank. Our statutes provide: "Inland and foreign bills of exchange and promissory notes are hereby declared to be negotiable obligations in this Territory, and collectible by and in the name of the holders and owners thereof." Cod. Sts. 385.

Again, the holder and owner of a promissory note is the real party in interest, and hence, under our statutes, the proper person to bring an action on such an obligation. Did the common-law rule prevail, then Fultz would have a right to sue the bank, in the name of Walters, for his benefit, and there would be no need of a resort to a court of equity to enforce his rights. For these reasons, we think the court erred in its ruling, as far as the bank was concerned. That there was no equity presented in which it had an interest, we think evident. In regard to Walters, had this case been properly presented by the demurrer, or briefs filed in this case, I, for myself, would be inclined to hold that the complaint presented no equity against him. The demurrer does not show wherein there was a misjoinder of parties. The point that the complaint does not show equity sufficient to charge either

party cannot be raised on a specification that there is a misjoinder of parties defendant. This point can be raised by our Code only under the specification that the complaint does not state facts sufficient to constitute a cause of action. The other ground specified in the demurrer goes to the point only that the complaint does not state sufficient facts to justify the court in giving the plaintiff the relief he asks against the bank, and does not present the question as to whether or not there was equity enough in the complaint to charge Walters. And there is nothing in the briefs of appellants that present this issue. This court does not feel called upon to rule upon any point, in a case like this, not presented by the exceptions or arguments of counsel.

Considering the premises, the order of this court is that the judgment of the court below be modified so as to give the relief asked against Walters alone, and that, as to the First National Bank of Helena, the demurrer be sustained and the cause dismissed.

Judgment modified.

CREIGHTON, appellant, v. HERSHFIELD, respondent.

EFFECT OF JUDGMENTS OF THIS COURT UNTIL REVERSED. The opinion of this court in affirming the judgment of the court below, in granting a new trial, is the law of the case until it is reversed by a higher tribunal.

Appeal from Third District, Lewis and Clarke County.

THE facts are stated in the opinion, which has been delivered in this case on the first appeal. 1 Mon. 639. The judgment was rendered by WADE, J.

TOOLE & TOOLE, for appellants.

CHUMASERO & CHADWICK, for respondents.

[The arguments of counsel are the same as those which are reported in the other hearings of this case, and are omitted.]

SERVIS, J. This action was originally commenced in the court below, June 21, 1870, and the appellants recovered judgment at a subsequent term. A new trial was granted afterward, at the December term, 1871, and the appellants appealed to this court. At the August term, 1872, this court affirmed the judgment of the court below in granting a new trial, and the cause was remanded. 1 Mon. 639. Upon the second trial in the court below judgment was rendered for the respondents, and this appeal was taken.

However much I might be inclined to differ from the opinion of this court, which has been referred to (1 Mon. 639), nevertheless that opinion is and must be the law of this case until it is reversed by a higher tribunal. *Lick v. Diaz*, 44 Cal. 479; *Pond v. Davenport*, id. 481. For this reason, the judgment of the court below is affirmed.

Judgment affirmed.

UNITED STATES, respondent, *v.* UPHAM, appellant.

INDICTMENT — *description of court.* The caption of the indictment in this case described the court as "the United States District Court of the Territory of Montana, for the Second Judicial District." *Held*, that there is no "United States District Court" in said Territory. *Held*, also, that the indictment is not vitiated by this erroneous description of the court, because the record accompanying the indictment shows that the same was found by a court having jurisdiction of the offense charged.

INDICTMENT FOR CONSPIRACY TO DEFRAUD THE UNITED STATES. Said indictment charged that three persons, an Indian agent, his clerk and a trader, conspired and agreed together to procure the goods of the United States, to be disposed of fraudulently for money, and thereby intended to cheat and defraud the United States. *Held*, that said indictment is good.

EMBEZZLEMENT — *Indian agent.* There is no statute of the United States under which an Indian agent can be indicted for embezzlement.

EVIDENCE OF FRAUD — *distribution of Indian goods.* Upon the trial of said persons, under said indictment, it appeared that said goods had been deposited with said Indian agent for distribution to the Indians. *Held*, that the government could prove that the Indians had not received the goods.

VERDICT IN CRIMINAL CASE. A verdict of guilty in a criminal action will be sustained if there is substantial proof to support it.

EVIDENCE WITHDRAWN BY COURT FROM JURY. A witness was asked if one of said persons had made any confession to him, and, during the discussion of an objection to the question, answered that he had. The answer was withdrawn from the jury by the court. *Held*, that the rights of said person were not prejudiced by these proceedings.

BIAS OF JUROR—*verdict set aside*. A person who has talked about the "Indian agency cases," and evinced bias generally in such cases, is not competent to serve as a juror upon the trial of said Indian agent for conspiring, with others, to defraud the United States; and a verdict of guilty returned by the jury (of which he was a member), in this case, must be set aside.

Appeal from Second District, Deer Lodge County.

THIS is the second appeal in this case. The first is reported, *ante*, 113. The case was tried by KNOWLES, J., with a jury, and appellants were convicted.

W. F. SANDERS, SHARP & NAPTON and SHOBER & LOWRY, for appellants.

There is no such court as that described in the indictment, "The United States District Court of the Territory of Montana for the Second Judicial District." The indictment has not been found by a legal jury. 1 Archb. Cr. Pr. 256; 1 Bishop's Cr. Pr., §§ 152, 155; 2 Abb. U. S. Pr. 177; *Sanders v. Farwell*, 1 Mon. 599, and cases there cited.

No offense is alleged in the indictment. Conspiring to procure goods to be embezzled is not made an offense under the laws of the United States. When such a fraud as may be punished criminally is actually committed by several persons in pursuance of a conspiracy, the conspiracy, as such, is not indictable, but the fraud only. *Lambert v. People*, 9 Cow. 586; *Commonwealth v. Hunt*, 4 Metc. 111; 2 Bishop's Cr. Law, 200; 1 Bishop's Cr. Pr. 169; 2 Brightly's Dig. 158, § 28.

The indictment shows that Ensign, one of the indicted parties, came properly in the possession of the goods described. If he converted them to his use he committed no crime, but is liable on his bond civilly. The appellants commit no offense by receiving the property from Ensign. The indictment does not show the means intended to be used to defraud, and is insufficient. *Commonwealth v. Shedd*, 7 Cush. 514.

The testimony relating to the distribution of goods to Indians by Ensign was clearly incompetent. The appellants had no control over the acts of Ensign as Indian agent, and bore no fiduciary relation to him.

The testimony of Clagett was admitted under objection, and afterward excluded. This did not cure the error. *Erben v. Lorillard*, 19 N. Y. 302; 2 Graham & W. 645.

There is no testimony to establish a conspiracy.

The court erred in its instructions to the jury.

One of the jurymen, Warren, was prejudiced, and had expressed an opinion as to the guilt of the appellant before he was called on the jury. He was an incompetent juror. *Tenny v. Gilchrist* 12 N. H. 462; *Busick v. State*, 19 Ohio 198; *United States v. Fries*, 3 Dall. 517; *People v. Plummer*, 9 Cal. 298; 2 Graham & W. New T. 396.

M. C. PAGE, U. S. Attorney, for respondent.

The caption is no part of an indictment. It may be wholly omitted if sufficiently supplied by the record. This is done in this case. 1 Wharton's Cr. Law, § 220.

The words of the caption are not words of naming, but of description. The court is sufficiently described to prevent any misapprehension. The statute precludes objections to the form of the indictment, which do not prejudice defendant. Cod. Sts. 198.

It is not necessary to charge that the object of the conspiracy was a legal crime, or that the means to be used were criminal. The offense charged is the creature of the statute, and we cannot borrow from the common law a foreign ingredient and attach it to the offense. The indictment follows the form in similar cases. 2 Wharton's Prec., form 638.

The proof of the declarations of the juror, Warren, is contradicted or explained away.

WADE, C. J. This is an indictment charging the defendants with a conspiracy to defraud the United States, and they ask a reversal of the judgment herein for the following reasons:

1. That no offense is alleged in the indictment, and that the court in which the same was found is unknown to the law.
2. That improper testimony was allowed to go to the jury.
3. That the testimony is insufficient to sustain the verdict.
4. That the court erred in the charge to the jury ; and
5. That one of the jurymen was incompetent by reason of bias and prejudice.

1. The court described in the caption of the indictment is "The United States district court of the Territory of Montana for the second judicial district."

The court thus described is unknown to the Territory. We have no "United States district courts" here. Our courts are statutory courts, created by acts of congress, and, although exercising the jurisdiction of circuit and district courts of the United States, they cannot for this reason be denominated "district courts of the United States."

But the record accompanying the indictment shows that the indictment was found by the grand jury of the district court of the second judicial district of the Territory of Montana, which court had undoubted jurisdiction to find such indictment, and the wrong description of the court in the caption of the indictment does not vitiate it, especially so when the record shows that the court in which the indictment was found had jurisdiction of the offense.

2. It is contended that no offense is charged in the indictment, and this conclusion is arrived at by maintaining that no Indian agent, clerk or employee in the Indian service can under the statute be convicted of the crime of embezzlement, for the reason that congress has failed to make embezzlement a crime as to such persons, and, this being the case, that there can be no crime of conspiring to procure embezzlement to be committed. It is indeed true that no Indian agent, as such, can commit the crime of embezzlement. By virtue of his office, he has every opportunity to commit the crime, being charged with the duty of receiving and disbursing large quantities of goods for the government, but, for some inexplicable reason, congress has failed to make such person capable of committing the crime of embezzlement. But whether or not this indictment charges an offense

does not depend upon this consideration. The defendants are not charged with conspiring to procure an embezzlement to be committed, but are charged with a conspiracy to procure the United States to be defrauded. The charging part of the indictment, leaving out descriptions, etc., is as follows: "That Ensign, Upham and Giddings wickedly devising and intending to cheat and defraud the United States, fraudulently, maliciously and unlawfully did conspire, combine, confederate and agree together, to cause and procure certain goods, wares and merchandise to be embezzled, and disposed of for money, with the intent thereby to defraud the United States," and that, to carry out such conspiracy, they did certain acts which are set forth in the indictment. The word "embezzlement" may be left out of this charge, and yet it would be perfect and complete, and would then stand in this way: "That the defendants conspired and agreed together to procure certain goods *to be disposed of for money*, with the intent to defraud the United States." Do these latter words, which are the substance of the charge in the indictment, come within the statute upon which the indictment was founded. The language of the statute is as follows: "If two or more persons conspire, either to commit any *offense* against the laws of the United States, or to *defraud* the United States in any manner whatever, and any one or more of said parties to said conspiracy shall do any act," etc.

Under this statute, there may be two classes of conspiracies. First, a conspiracy to commit an offense against the laws, and, second, a conspiracy to defraud the United States in any manner, whether by a violation of the laws, or by any other fraudulent act.

Transposing the statute, it reads, "If two or more persons conspire to defraud the United States, in any manner whatever," and any one or more of such persons do any act to carry such conspiracy into execution, such persons shall be deemed guilty of a misdemeanor, etc.

And although a conspiracy to procure an embezzlement to be committed would be impossible for an Indian agent or employee, because there is no such crime for them, yet a conspiracy to procure the United States to be defrauded may be committed even by an Indian agent, and, turning to the charge in the indictment,

we find that this Indian agent, clerk and trader conspired and agreed together to procure the goods of the United States, to be disposed of for money, fraudulently, and intending thereby to cheat and defraud the United States. Such an act, if carried into execution, is a fraud upon the United States and within the statute.

It is contended that these defendants, or, at least, that the defendant Ensign is the servant, agent or trustee of the United States, and that these goods were rightfully in his possession, having been placed there by the government for certain uses and purposes, and that if Ensign disposed of these goods wrongfully, or converted them to his own use, he is guilty simply for a breach of trust, and only liable upon his bond for such acts. We may admit that Ensign was the agent and trustee of the United States, and that the goods come rightfully to his possession, and that he could not, therefore, be guilty of stealing such goods; yet all this does not in the least take away his power to enter into a conspiracy to defraud the United States by combining and confederating with others to fraudulently dispose of such goods. A breach of trust is a fraud, and a breach of trust accompanied by a conspiracy to fraudulently dispose of the goods intrusted to his care, is a fraud upon the United States, and directly within the statute. And so, admitting that the goods come rightfully to the possession of Ensign, he still had the power to enter into the conspiracy as charged.

3. The next question relates to the admissibility of testimony. The question objected to is as follows: "State what and how much was distributed at the first public distribution?"

The goods had been deposited with Ensign, and whether they had been rightfully or wrongfully disposed of was the question. The object of the question propounded, and the other questions of like character, was to ascertain what part of such goods had been distributed to the Indians. If the Indians had not received the goods, and they had been disposed of, this was a circumstance properly given to the jury for consideration,—at least, it could not have prejudiced the defendants, and we can see no objection to permitting the question to be answered.

4. Insufficiency of the evidence to sustain a conviction. Neces-

sarily, all the evidence is not contained in the record. The record does not preserve the appearance of the witnesses, their manner of giving their testimony, their interest, their hesitation, their eagerness or their feeling. And it is the duty of an appellate court, if, looking upon the testimony preserved, it sees substantial proof to sustain the verdict, to do so, and that, in this record, there is testimony tending to prove the guilt of the defendants, I cannot doubt.

5. It is objected that the testimony of W. H. Clagett was incompetent and improper, and being thus, that its pernicious effect upon the jury could not be counteracted or destroyed by the court wholly withdrawing such testimony from the jury. An examination of the record shows that the witness gave no testimony whatever that could in any manner affect the case or the jury. The witness was asked if the defendant Upham had made to him any statement or confession. Objection was made, and during the pendency of the discussion the witness answered that he had; but what the statement was, or what the confession was, if any, never went to the jury, and they could not, therefore, by any possibility, have drawn any conclusion whatever from such testimony. And even the answer given was entirely withdrawn from their consideration, and if it had not been, we cannot see how or in what manner it could have prejudiced the defendants.

6. Objection was taken to many of the instructions given and refused, but we think the charge of the court substantially covers all the instructions applicable to the facts asked for by the defendants, and we see no error in the charge as given.

7. The remaining question relates to the motion for a new trial, based upon affidavits as to the competency of the juryman T. C. Warren. Many affidavits were filed, showing that said juryman, after being summoned to serve for the term, in speaking of the cases known as the "Indian agency" cases, used such expressions as these: "If he found them the least guilty, he would cinch them plenty;" or, "I am on the jury in those cases, and will send up the defendants;" or, "I want to be on the jury; I would like to send up the defendants." By counter affidavits these expressions are shown to have been made in jest and sport, or not at all, and that the juryman did not know the defendants in this par-

ticular case, and that he had no bias or prejudice whatever against these particular defendants, and but for the affidavit of the witness Simpson, the juryman might have been held competent. Simpson says the juryman said to him that he had formed an opinion in the case, but that evidence might remove such opinion. In his affidavit explaining his first affidavit he says the juryman referred to no particular case, but to the Indian agency cases generally. The present case being an Indian agency case, or known as such, we do not perceive that the explanation at all impairs the force of the first affidavit, and that affidavit, unexplained, would tend strongly to show that the juryman was biased or prejudiced in the case in which he afterward served as a juryman. This the juryman denied, but there is no disputing the fact that he had talked about the Indian agency cases, and in such talk had evinced bias or prejudice generally in those cases, and there is nothing to exempt this case from its operation.

We think, therefore, that the juryman was incompetent to serve in the case, and for this reason alone reverse the judgment and remand the case for a new trial.

SERVIS, J. I concur in the opinion of the chief justice, except as to the sufficiency of the evidence, which I hold wholly insufficient to warrant a conviction.

Judgment reversed.

KNOWLES, J., dissenting. I feel impelled to dissent from the opinion of the majority of the court upon the point of the competency of the juror Warren. On his *voir dire* he swore that he had not formed or expressed an opinion as to the guilt or innocence of the defendants, and that he had no prejudice against them.

There is not an affidavit filed that shows that he had ever expressed an opinion as to the guilt or innocence of these parties, save, perhaps, Brown's, and Mr. Brown is thoroughly impeached. Except his remark to Hugal and Simpson, it appears that, in a joking manner, when rallied about being on the jury, and told that no honest man could sit on the jury; that the lawyers wanted some one they could gull around; he said, according to some, if we

find them in the least bit guilty, we will sock them through; others testify that he said he would cinch them; but all swear that no particular cases were mentioned, and that they understood his expressions as a joke. In the affidavit of Simpson he does not say that he ever heard Warren say any thing about the innocence or guilt of the defendants. Simpson says: "We were speaking of the cases, and I asked him if he had not expressed himself; he said he had, but evidence would change his expression; I had heard he had expressed himself as to their guilt, but evidence would change it." Now, what was their expression? Were they to the effect that he believed them guilty or not guilty? What kind of an opinion was this? Was it made up from facts that he had heard? Did he know any thing about the cases? He swears, himself, he did not, and his affidavit is competent for this. In a subsequent affidavit Simpson says no particular cases were mentioned; only Indian agency cases generally. Hugal says that Warren was joking, as he understood; and if Warren did say as Hugal says, "If we find them the least bit guilty we will put them through," this is no expression that would disqualify the juror. Now, if such a juror is incompetent there are not fifty honest men in Montana that are competent for jurors in cases where Indian agents are charged with frauds against the general government.

The general character of Warren was put in issue by the prosecution, and the affidavits presented by them show that he is a joking and extravagant man, but that he is truthful and honest in all serious matters; and the affidavits of his fellow jurors show that he was among the last to agree to a verdict of guilty, and these affidavits are competent to show whether he had any bias or not. The affidavits all show that these expressions of Warren were regarded as jocular by those who heard them.

It must appear that a witness has formed or expressed such an opinion as will show that he has bias against the criminal to make him incompetent. I find no such bias.

FROHNER, appellant, v. RODGERS, respondent.

ASSIGNMENT OF ERRORS — statement. A statement on appeal that does not contain an assignment of errors must be disregarded.

MOTION FOR JUDGMENT. The practice of filing a motion for judgment, after a verdict has been recorded by the clerk, is not required by the Civil Practice Act, and therefore unauthorized.

INFORMAL VERDICT. Courts can correct informalities in a verdict which do not affect the substance.

VERDICT CURES DEFECTIVE COMPLAINT — description of lode claim. In this action in the nature of ejectment, the plaintiffs claimed two quartz lodes, alleged to be fifteen hundred feet in length and six hundred feet in width. The jury returned this verdict: "We, the jury, find for the plaintiffs, and allow and find for them only fifty feet on each side of said lodes. No damages allowed." *Held*, that the defective description of the premises specified in the complaint was cured by the verdict. *Held*, also, that the judgment must follow this general verdict.

VARIANCE BETWEEN PLEADINGS AND PROOF. A variance between the pleadings and proof must be taken advantage of at the trial, and cannot be considered by this court upon an appeal to conform the judgment to the verdict.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J.

JOHNSTON & TOOLE, for appellants.

What judgment should be entered on the verdict? This is the only question before the court. There is no exception to the verdict. The evidence cannot be examined.

Questions of boundaries, identity of monuments, etc., are subjects of parol proof and are always left to the jury. *Tyler on Ejectment*, 820; *Curtis on Patents*, 253; *Davis v. Rainsford*, 17 Mass. 207; *Ferris v. Coover*, 10 Cal. 625.

Where the jury finds for the plaintiff in ejectment, he is entitled to judgment for a less amount of land than he has claimed in the complaint. *Inglis v. Trustees, etc.*, 3 Pet. 112; *Barclay v. Howell*, 6 id. 500. The answers do not deny that the veins claimed by appellant are located as set out in the complaint.

In ejectment, artificial objects control courses and distances, and natural objects control both. *Wyckoff v. Stephenson*, 14 Ohio, 20.

Courts will give effect to verdicts when the intention of the

jury can be ascertained, and pronounce judgment accordingly. *Mendelsohn v. Anaheim L. Co.*, 40 Cal. 660.

The pleadings, instructions and verdict show that the jury found 1,500 by 100 feet of the mine described in the complaint, for the appellants, and that there is no difficulty in designating the lot found by the jury. The judgment should conform to the verdict. *Farrow v. Farrow*, 2 J. J. Marsh. 338; *Ball v. Lively*, 4 Dana. 372; *Eden v. Rathbone*, 3 Conn. 291.

Appellants may have judgment for a less amount of land than they sued for in their complaint. Act of Congress, May 10, 1872, for development of mineral resources, § 7.

A defective complaint, which is too general, but states facts to constitute a cause of action, is cured by the verdict. Every fact necessary to support the verdict will be considered as proven at the trial. 1 Smith's L. C. 926; 3 Estee's Pl. 466; *Conley v. Chedic*, 7 Nev. 336.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for respondents.

Appellants' statement does not point out the errors relied upon, and must be disregarded. Civ. Pr. Act, § 371; *King v. Sullivan*, 1 Mon. 282. This court can only consider the judgment roll and no error appears in it.

The issues raised by the replications were never and could not be tried. If they are considered by this court, there must be a new trial. Civ. Pr. Act, § 378.

Appellants claimed two parallelograms, each being 1,500 feet long and 600 feet wide. This location was made under the act of congress, approved May 10, 1872, and referred to by appellants. Under the laws of Montana, lode claims could only be 100 feet wide. Cod. Sts. 522, § 3; U. S. Mining Laws and Reg. Nov. 20, 1873. The locator of a lode claim cannot follow the same beyond the tract of mining land claimed. Act, May 10, 1872, §§ 3, 9.

Taking the description given in appellants' complaint, appellants have no right to any lode. There is nothing to support the verdict. Civ. Pr. Act, §§ 55, 66.

There is a fatal variance between the allegations of complaint

and verdict, which could have been cured only by an amendment of complaint. 1 Greenl. Ev., §§ 63, 73; *Lyon v. Blossom*, 4 Duer, 318; *Stout v. Coffin*, 28 Cal. 65.

The jury found for a limited portion of demanded premises, and the verdict was silent as to the remainder. *Graham & W. New Trials*, 153, 400-402; *Coke Littleton*, 227.

The judgment roll shows nothing about the boundaries, referred to by appellants, and shows that appellants are not entitled to any judgment.

SERVIS, J. The defendants file objections in this court to all that part of the transcript except the judgment-roll thereof, because the statement upon appeal does not contain an assignment of errors, as required by section 371 of the Practice Act, which objection, we think, well taken, and fully sustained by the authorities cited by defendants' counsel.

The action proper is one in the nature of ejectment, under our Code, and for the recovery of the possession of certain quartz leads or lodes.

Upon an examination of the judgment-roll proper, we find the complaint seeks to recover from the defendants the possession of two quartz lodes, each of 1,500 feet in length and 600 feet in width; that the same was tried to a jury upon issue duly joined, and the following verdict rendered:

"We, the jury, find for the plaintiffs, and allow and find for them only fifty feet on each side of said lodes. No damages allowed."

Upon this verdict the plaintiff *moved* for judgment, first, for *all* the property described in the complaint; second, for fifty feet on either side of said lodes; and the defendants also moved for judgment for them, notwithstanding the verdict — *Non obstante verdicto*.

Whereupon the court rendered the following judgment:

"Wherefore, by virtue of the law and by reason of the premises aforesaid, and upon said verdict and the pleadings in this action, it is adjudged that the plaintiff * * * recover of the defendants * * * the possession of all those portions of the property described in the plaintiffs' amended complaint, described

as follows, that is to say, that the said plaintiffs recover, as aforesaid, so much of the Cannon lode claim mentioned in plaintiffs' amended complaint as is now developed and uncovered by the discovery shaft, or otherwise, on said lode claim, in length along said lode, together with fifty feet on each side of said portion of said lode, and no more. Also, so much of the Cannon Extension lode (east) claim mentioned in said complaint, as is now developed and uncovered by the discovery shaft, or otherwise, thereon, together with fifty feet on each side of said portion of said lode, and no more. And it is further adjudged that the plaintiffs have and recover of said defendants, except defendant Arnold, their costs," etc.

The only question necessary for us to consider is as to the authority for, and correctness of, this judgment.

The practice of *moving* for judgment after verdict seems to be without statutory authority or seeming necessity. If judgment be for the recovery of money only, the clerk shall render judgment within twenty-four hours after verdict, unless the same be stayed by order of the court. In other cases the court renders judgment as of course, unless a new trial be granted or other motion filed to intercept the judgment. But however necessary or useless may be this practice of obtaining judgment, it cannot affect the determination of the question under consideration.

The verdict rendered was but a general verdict, although they found the *width* of the property, and thereby less in amount than the plaintiffs claimed. This was but in accordance with the instructions of the court, and was good law.

If the verdict had been incorrect in form, the court could have corrected the informality, but not in substance.

It is true, under our Civil Practice Act, § 215, the jury might, at their discretion, have rendered a general or special verdict. A *special* verdict, by section 214 of our Practice Act, is such as shall present the conclusions of facts, which shall be so presented as that nothing shall remain but for the court to draw therefrom the conclusions of law. But no such verdict was ever rendered, but just such verdict as the court directed under the law, ~~the~~ the proof so justified, as we must presume it did. There was then nothing left for the court to do but either grant a new trial, if the

facts so warranted, or to render a general judgment upon this general verdict. Even if this could be construed into a general verdict, all the facts essential to the rights of the parties are not pretended to be presented, and it is not competent for the court, where such repugnancy exists, to supply the same, and, with this complex kind of verdict, partly rendered by the jury, and partly by the court, render judgment therein, it would be but to supplant the court for the jury, and thus deprive a party of his constitutional rights.

It is, however, said that the complaint in this action is too defective to support the verdict, and entitle the plaintiffs to the judgment they demanded. The complaint avers *title, possession, and ouster*. And the presumption of law is, that every fact necessary to justify the verdict was duly proven. And, although the complaint may have been defective by being too general, and the like, yet it seems counsel considered it sufficient to go to trial upon, the court deemed it sufficient to render a judgment upon, at least for such portion of the premises described therein as the court deemed the plaintiffs entitled to, and we deem all such defects cured by verdict.

Again, it is said that there is such a variance between the proofs and the pleadings, that no other judgment could be rendered than was rendered by the court below. We cannot examine these proofs, as they are excluded from our consideration by sustaining the objection taken by defendants' counsel; but, if we could, this was a matter to have taken advantage of upon trial, and cannot now be considered upon appeal to conform the judgment to the verdict, but judgment should follow the verdict until set aside by the *party opposing it*. And the authorities cited by plaintiffs in their original and reply brief fully sustain the view we have thus taken.

The judgment of the court below is therefore reversed, and the cause remanded.

Judgment reversed.

WADE, C. J., dissenting. Failing to agree with my brothers in this case, with much deference I submit the following dissenting opinion:

This was an action of ejectment brought by plaintiffs to recover

of defendants the possession of certain silver quartz leads. There was a trial, verdict for plaintiffs, and judgment on the verdict for the leads as now developed and defined. The plaintiffs, conceiving that the judgment as rendered is not as broad as the verdict, and that their rights are thereby sacrificed, appeal to this court for a modification of the judgment. The verdict is in effect as follows:

We find for the plaintiffs, and allow and find for them only 50 feet on either side of said lodes. No damages.

The verdict giving no description of the property, and only referring to it as "said lodes," we must necessarily go to the complaint for a description of the demanded premises, and to ascertain for what the verdict was rendered, and to what the judgment thereon will attach. The description of the premises in the complaint thus becomes a part of the verdict, and forms the basis upon which the judgment must either stand or fall.

The description in the complaint of the demanded premises is as follows: "Fifteen hundred feet on the Cannon lode or lead, and commencing at a monument and stake 300 feet south-easterly from Discovery shaft on said lode; thence running westerly, and 300 feet distant from the middle of the vein of said lode, and along said lode 1,500 feet; thence northerly to the middle of the vein of said lode 300 feet, and northerly 600 feet to a stake, being the north-westerly corner of said claim and lode; thence easterly 1,500 feet to a stake, being the north-easterly corner of said claim; thence southerly 600 feet to a stake, being at the south-easterly corner of said claim and lode, and the place of beginning, the said claim being 1,500 feet along the vein of said lode, and extending 300 feet each side from and along the middle of the vein of said lode." The Cannon extension has a similar description as to length and breadth of claim and boundaries.

Is this description of the property whose recovery is sought so definite and certain as that, being incorporated into the verdict, it will support and sustain a judgment for the plaintiffs for such possession? This is the great question in the case, and the answer to be given must conclusively determine it.

It is claimed, first, that the location of these leads, not having been made in pursuance of the act of congress of May 10, 1872, is void, and therefore that the complaint does not state a cause of

action; and second, that if the act had been complied with in other respects, the description of the property is so vague and uncertain as to amount to no description whatever, and hence that there is no foundation upon which to rest a judgment.

1. These lodes were discovered and located subsequent to the act of congress of May 10, 1872, and the rights of the parties herein must be determined by an interpretation of that act. The second section thereof provides: "A mining claim, located after the passage of this act, whether located by one or more persons, may equal but shall not exceed 1,500 feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than 25 feet on each side of the middle of the vein at the surface, except where adverse rights existing at the passage of this act shall render such limitation necessary. The end lines of each claim shall be parallel to each other."

The first requisite under this act is to discover a vein or lode. This being done, the law defines the extent of surface-ground which may attach thereto and form a mining claim under this statute. This statute repeals the act of July 26, 1866, and makes an entire revolution as to the mode and manner of locating quartz claims. Prior to its passage, parties making a discovery of a vein or lode could follow it, in any direction it might take, for 2,200 feet, with all its dips, variations and angles, and surface-ground in width, as limited by the laws of the Territory, or the rules and regulations of the mining district, but by this statute the person discovering a vein or lode may claim a parallelogram of land 1,500 feet in length by 600 feet in width, but the width is controlled by the laws of the State or Territory, or the rules and regulations of the mining district, but shall not be less than 25 feet on each side of the vein or ledge. Instead of becoming possessed of a vein or lode that he may follow in any direction 2,200 feet, he is, by virtue of this act, entitled to the possession of a piece or tract of ground, after discovery of a vein or lode thereon 1,500 feet in length, and varying from 50 feet to 600 feet

in width, as the local laws, rules and regulations may determine; and he is also entitled to all the veins, lodes and ledges that may be found within these boundaries, as is provided in the third section of the act, thus demonstrating that it was the intention of congress to give to the discoverer of a vein or lode, not simply the possession of this lode and the tract of ground, and of all the lands it might contain, and hence the necessity of absolute certainty as to the boundaries, as will hereafter more fully appear.

The act of congress fixes the length of the mining claim, and defines the maximum and minimum width thereof, and within these limits as to width, gives authority to the local legislatures, or to the rules and regulations of the mining district to declare the lateral extent of the claim. That this is the meaning of the act does not seem to admit of much doubt. The second section provides that, "No claim shall extend more than 300 feet on each side of the middle of the vein at the surface, nor shall any claim be limited, *by any mining regulation*, to less than 25 feet on each side of the middle of the vein at the surface;" thus virtually declaring that within these limits the mining regulations might fix the width of the claim.

The commissioner of the general land office, at Washington, in referring to section 2, already quoted herein, says, in his instructions to surveyors, etc.: "By the foregoing, it will be perceived that no lode claim, located after the date of said act, can exceed a parallelogram 1,500 feet in length by 600 feet in width, but whether surface ground of that width can be taken depends upon the local regulations, or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than 1,500 feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than 50 feet in width, unless adverse claims, existing on the 10th day of May, 1872, render such lateral limitation necessary."

This is not a judicial determination of the question, but the opinion is from such a source as entitles it to weight, and is so clearly within the meaning of the section referred to, that we indorse it, and say that the width of the surface ground or mining claim must depend upon our Territorial statute, or the mining

regulations of the district, where the same is located, subject only to the limits as prescribed by the act of congress.

Recurring now to the Territorial statute, defining the width of every lead or lode claim, which statute was in force at the date of the location of the claims in question, and we find the following (Cod. Sts., p. 522, § 3): "Claims on any lead, lode or ledge, either of gold or silver, hereafter discovered, shall consist of not more than * * * 50 feet on each side of said lead, lode, or ledge for working purposes."

This is a general statute, and in force in every mining district in the Territory, and limits the width of claims upon any vein, lode or ledge to 100 feet, and it thus limited the claims of the plaintiffs herein, and, in failing to comply with this statute, they failed to locate their claims as required by the act of congress, and having neglected to comply with the only law that gives them any rights in the premises, it would seem that their acts are void. They enter upon the public lands, and take possession of just six times as much thereof as the law authorizes them to hold, by locating a claim for 600 feet instead of 100 feet in width, and thereby prevent five others, who are equally entitled with themselves, to enter upon the mineral lands, and to possess what the law gives them there, from entering thereon, and instead of possessing one claim, as the law entitles them to do, they take six claims, and attempt to hold them in violation of all law, and without any authority whatever, and they describe their six claims thus unlawfully taken, held and possessed by so convenient a boundary, that they may be expanded to an unlimited extent, and in any conceivable direction.

It is said, and truly, that, in an action of ejectment, if a party claims more lands than he is entitled to, he may yet hold that to which he has a legal right. This applies to cases where the title to a portion of the premises is undisputed, or where it is established by the proof, but in cases like the one under consideration, where the possessory title can only be acquired by the performance of certain defined acts, and where a failure to perform defeats all title and all right to possession, the doctrine as to a recovery of a portion of the premises has no application whatever. A failure to comply with the statute in entering upon

and locating a mineral claim, vitiates the location, because there is no right, except as given by the statute, and this right depends upon the performance of certain precedent conditions. Otherwise the entry and location is a trespass.

The right to enter and locate claims upon the mineral lands is but a license granted by the government, who is the owner of the soil, which license has attached to it certain conditions precedent, the performance of which, by the person making the entry, creates in him a possessory easement in the lands thus entered, which easement may ripen into a perfect title, where the requirements of the law granting the right of entry have been fully complied with. But an entry and location made in defiance of the law, and with no pretended compliance therewith, is a trespass from the beginning. The act itself provides (§ 5) that a failure to comply with any of these conditions pertaining to the location of the claims, shall vitiate the location and subject the same to relocation, and among these conditions is the extent and boundary of the claim.

In this case the plaintiffs, by virtue of the act of congress of May 10, were granted a license, upon certain conditions, to enter upon and locate one mining claim upon the public mineral lands, which claim might be 1,500 feet long by 100 feet wide, the boundaries of which to be marked and designated with distinctness and certainty. But instead of following the law in the premises, they take possession of six claims, or six times the amount of ground they are entitled to, and bound and describe it so indefinitely that the description thereof would apply equally well to any ground they might see fit to claim; so that, whatever the plaintiffs' rights are in the premises, they are rights acquired by a direct violation of the act of congress, and by a total disregard of the law that ought to have directed and controlled their actions in making their location, and we, therefore, fail to discover by what rule they can now claim any right to the ground thus located, even though the description and boundary thereof had been such as the law requires.

2. The second inquiry to which we direct attention is this: Is the description of the property in the complaint such as the act requires, or is it so vague and uncertain as that no property is

described, and thereby a failure to state a cause of action? And the cause of action failing, upon what can the plaintiff rest his judgment?

It is a familiar principle that the complaint must support the judgment, and if it fails, the judgment must also fail. The judgment can be no broader than the complaint, and any infirmity in the cause of action creates a like defect in the judgment.

Does the complaint conform to the requirements of the act of May 10 as to the boundaries of the location or claim? That act provides (§ 5): "The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

The description therefore must be certain, and made so by reference to some permanent natural object, so as to identify the claim, and this evidently for the reason that the boundary thus made must form the basis upon which the patent is to issue. A re-survey is required before the patent is granted, but certainly the re-survey could not change the boundaries of the original location, and especially not where adverse claims had intervened. Temporary stakes and monuments will not answer the requirements of the law unless accompanied by courses and distances, or by a reference to some well-known points or objects, as the intersection of gulches, ravines or roads, or prominent buttes, hills, etc., in the immediate vicinity. Thus, a line starting at a given point and running in a *southerly* direction to a stake would be altogether too indefinite, for the line thus drawn might vary in its course nearly 180 degrees. A line running east, one minute south, or exactly south-east, or south, or south-west, or west, one minute south, would be described by a line running in a *southerly* direction. A reference to the description of the claims in the complaint will show them of this character. There are no natural objects, no permanent monuments to identify the claims. The boundary commences as follows: "Fifteen hundred feet on the Cannon lode or lead, and commencing at a monument and stake 300 feet *south-easterly* from Discovery shaft on said lode."

To find a starting point on this line, we must first assume that there is such a thing as Discovery on the Cannon lode, properly marked as the law requires. There is nothing contained in the description to identify this Discovery shaft, and how it is to be distinguished from any other prospect hole within the ten-mile mining district it is not easy to see. The description is silent upon the subject. We must next assume that there is a Cannon lode and Discovery so marked and identified as to distinguish it from an hundred others which we may easily presume are within the same mining district. Perhaps this Discovery shaft is identified by a board driven into the ground, upon which is written in pencil its name and that of the discoverer, as was the common custom of the country; but if the winds or the frosts should happen to throw down the board, or the storms to deface the names in pencil, what would distinguish this Discovery shaft from any other prospect hole? Does the statute permit any vague uncertainty of this kind, and does it not rather require absolute certainty in a matter so easy to identify and describe beyond the possibility of mistake?

If so lucky as to find this board or hole among the countless others of a similar character, which we have a right to presume may be found within the ten-mile mining district, and we are only referred generally to this district for this Discovery shaft, without any hint or direction as to what part of the district the hole will likely be found, which is no more definite than to refer to it by giving the name of the county in which it may be located, then proceed from this shaft, if perchance we have found the right one. 300 feet in a *south-easterly* direction to a stake. But where is this stake likely to be found? No course is given, and we may search for it over an area of almost 90 degrees, for a stake at a point east, one minute south, or south, one minute east, or at any intermediate point between these two, would answer the description *south-easterly*, and a line drawn by this description might vary in its direction more than 89 degrees. After reaching this indefinite, uncertain point, not identified by a reference to any natural object, thence proceed *westerly* 1,500 feet and 300 feet from the middle of the vein of said lode to a stake. Here we have a larger liberty. The area where the stake may be found is

more extended. Instead of a quarter, we have half a circle in which to draw the *westward* line. Instead of about 90 degrees we have nearly 180 degrees in which to vary the westerly line, to suit our convenience. That is to say, a line drawn south one degree west, or north one degree west, or in any other direction between these points, would exactly suit the description *westerly*. Indeed, this is an accommodating description. It is so elastic and easily conforms itself to the circumstances surrounding it, that the plaintiff, armed with such a weapon as this, could claim any good lead that might be discovered anywhere in the vicinity of his prospect hole.

But it is said that this westerly line must run 300 feet from the center of the vein or lode. This would make the line definite and certain, providing the whereabouts of the vein were known. But the vein itself exists only in the imagination. It is mere matter of conjecture whether there is a vein or not, and the only means by which we can even guess that there is a vein or lode is the fact of a discovery shaft more than 1,500 feet distant. And if there is a lode, the direction it takes and the course it runs is as uncertain as the westerly line we have described; so if the westerly line may vary in its direction 180 degrees, the line of the middle of the vein may likewise vary to the same extent, for no monument of any kind, not even a board or stake, attempts to mark or designate the middle of the vein or its direction. This ignorance of the vein, if there should happen to be one, accounts probably for this elastic boundary, so that, when a lead should be located as the law requires, this boundary might apply to and hold it.

Having reached the undefined end of this westerly line, thence proceed *northerly*, passing by the middle of the vein, which point is a myth, 600 feet to a stake which is the north-westerly corner of said lode or claim. Here again we have the liberty of nearly 180 degrees in which to establish this corner, and whether this *north-west* corner is south-east, north-east, south-west, east, west, north or south from Discovery shaft, it is utterly impossible, from this description, to determine.

Starting out from the north-west corner, which may be found at any convenient point required, thence *easterly* 1,500 feet to a stake, being the *north-easterly* corner of said claim. Here, also,

we can vary our course 180 degrees, or thereabouts, and the corner we establish may be in any other direction but north-east.

Having traveled around a half circle, whose diameter is 1,500 feet, and found what is called the north-east corner, thence *south-erly* 600 feet, to the place of beginning, which is said to be the south-easterly corner of the claim, but in what direction this point is from discovery shaft, we cannot ascertain, from this description, within 90 degrees, and whether the tract of land described by this boundary would make a claim running north and south, east and west, north-east and south-west, or south-east and north-west, it is utterly impossible to determine from this boundary. And this description would apply to any other lode within the ten-mile district, as well as to the Cannon lode. It may be made applicable to any lead, represented by simply a prospect shaft, within all the district, for the reason that nothing in the description defines the locality of the Cannon lode, or so marks it as to distinguish it from any other lead. No hill, mountain, stream, house or tree directs where the lead may be found, or indicates its locality, and for all there is in this boundary it will apply precisely as well to one lead as another anywhere within the ten-mile mining district.

We, therefore, say that the description and boundary of this claim fails to comply with the act of congress, wherein it is required that the claim shall be located by reference to some natural object, or permanent monument, as will identify the claim, and that the location must be so distinctly marked on the ground that its boundaries can be readily traced.

The Cannon extension lode has a boundary precisely similar to that of the Cannon lode, and by virtue of these two descriptions, the plaintiffs claim a tract of land 3,000 feet long by 600 feet wide, and by virtue of the description and boundary of these claims, they become so extended that they can claim all the leads within a circle whose diameter is 3,000 feet. And if any other parties should come within this charmed circle, and make discovery of a lead, and develop the same by the expenditure of large amounts of money, whereby the same become valuable, these plaintiffs, by virtue of their plastic description and boundary, could apply the same to any new and valuable discovery that

might be made within the circle, for where no course is given to the line of boundaries, and no natural, immovable object referred to for the purposes of identification, even if the ends of the *westerly, northerly, easterly* or *southerly* lines were designated by temporary boards or stakes, it cannot be supposed that they would endure but for a short time, and are liable to be moved at pleasure and with perfect safety, where no course is given; so that the boundary given is a license to run the lines of the claim absolutely to suit the convenience of claimants. And that is this case, and it seems to me it illustrates the folly and injustice of maintaining a boundary and description of this character, especially so when the same violates an express act of congress.

It is claimed upon the part of appellants, that the verdict cures all the uncertainties of the complaint, and that we must presume, by reason of the verdict, that the jury had sufficient proof before them to reduce the boundaries of the location to absolute certainty. It is undoubtedly true that we must presume the verdict to be the result of proof, and, if this finding of the jury had been made certain, then a judgment rendered thereon would be of the same character. But a reference to the verdict as found will show that it partakes of the same uncertainty as the complaint. The verdict finds for the plaintiffs 50 feet on either side of "said leads." What leads? None other than those described in the complaint, and as therein described. The judgment on the verdict must attach to the leads mentioned in the complaint, and no others, and the proof cannot make the judgment certain, if the complaint is uncertain; neither can proof aid an uncertain verdict. The verdict is supposed to be the result of the proof. The property mentioned in the complaint, as therein described, becomes a part of the verdict, by virtue of the reference therein to "said leads," so the verdict, notwithstanding any proof before the jury, is just as uncertain as the complaint, and very likely for the reason that the proof did not aid the vague uncertainty of the boundaries in the complaint.

By virtue of this verdict, the plaintiffs now demand a judgment for the possession of "said leads;" in other words, for the possession of 50 feet on either side of an imaginary lode, and 1,500 feet along its length, in any direction it may happen to

take, and of this there is no guide except a prospect-hole somewhere within the wide limits of the ten-mile mining district, the particular locality of which is designated by no object by which it can be found, and this demand for judgment is based upon the proposition that we must presume that the jury had sufficient proof before them to identify the leads. This presumption is of little use to us when the jury deliberately attach to their verdict all the uncertainties of the complaint. If they had made their verdict certain, then we might presume the proof was of the same character, and so likewise the rendition of an indefinite, uncertain verdict, presumes only proof of the same kind.

The presumptions in favor of the verdict do not cure the defects in the boundaries, and yet we are called upon to give a judgment for the plaintiffs for the possession of a tract of land 100 feet wide by 1,500 feet long, which land must be equally divided in width by a vein or lode running through its exact center, which lode, as claimed, is yet undiscovered and unknown, and if it was known, its boundaries, in the complaint, would give no light as to the direction it ran, or the course it would take.

Suppose the plaintiffs had a judgment for 50 feet on either side, and for 1,500 feet along "said leads," how could they obtain possession, or how could a writ of possession be executed? In the first place a lead extending along the 1,500 feet must be discovered and located, and an officer having a writ to execute could, by virtue of the description in the complaint, search, in almost any conceivable direction, from Discovery shaft for "said leads." Such a judgment, and a writ requiring the officer to enter upon a prospecting expedition in search of an imaginary lode, would be void for uncertainty.

The plaintiffs say they will take the chances of finding the property if we give them the judgment they demand. But a judgment should be the final determination of the rights of the parties, and should not be simply the foundation upon which to plant another lawsuit to settle matters that should have been adjusted by the judgment.

Therefore we say there is no cause of action stated in the complaint; there is no property described therein, and hence there is nothing upon which to base a judgment. The verdict finds for

the plaintiffs for the property described in the complaint, but as there is no property therein described, the verdict is a nullity, and no judgment ought to be rendered thereon.

For these reasons we think there should be a judgment for the defendants.

SMITH, respondent, *v.* WILLIAMS, appellant.

RULES OF STATUTORY CONSTRUCTION. Courts apply the rules and principles of interpretation to the statutes, which are ambiguous, doubtful and uncertain.

SAME—*plain statutes need no interpreter.* Statutes which are expressed in plain and definite language require no judicial construction, and must be enforced according to the intention of the law-making power.

ACT TO PREVENT THE TRESPASSING OF ANIMALS UPON PRIVATE PROPERTY EXPOUNDED. S. brings this action against W. to recover damages for the destruction of his growing grain by the cattle of W., which broke and entered his farm. The statute (Cod. Sts. 373, § 1) provides that if any cattle "shall break into any ground inclosed by a lawful fence," the owner of the animal "shall be liable to the owner of such inclosed premises for all damages sustained by such trespass." *Held*, that there must be a substantial compliance with the statute; that an immaterial variation in the height of the fence from that of a lawful fence would not defeat the action, and that a lawful fence, or an obstruction of the same character, must surround entirely the ground or premises, as a condition precedent to the right to bring an action for damages.

EVIDENCE MUST BE CERTIFIED. This court will not examine the evidence in the transcript, if it is not certified to be correct by the judge who tried the cause, or agreed upon by the parties.

Appeal from First District, Jefferson County.

THE cause was tried before SERVIS, J.

S. ORR and SHOBER & LOWRY, for appellant.

The court erred in saying, in effect, to the jury that it was unnecessary for respondents' premises to be inclosed to enable respondents to recover. This instruction disregarded the law of the Territory. Cod. Sts. 373, § 1. This requires the premises to be "inclosed by a lawful fence," which means entirely sur-

rounded by the fence, or a similar obstruction. Webster's definition of "inclosed." The statute defines a lawful fence. Cod. Sts. 476, ch. 25.

Stock owners are not liable for any injury to the crops of a party, if the premises are not entirely surrounded by a lawful fence, as defined by the statute. Cattle in this Territory are free commoners, and can roam and graze at large upon the public range. Stock owners are not required to guard their stock from ranging upon any premises, except those which are lawfully inclosed. Any other construction is contrary to the plain provisions of the statutes and the intention of the legislature.

No case can be found to conflict with these views, and the following authorities support them. *Waters v. Moss*, 12 Cal. 536; *Comerford v. Dupuy*, 17 id. 308; *Seeley v. Peters*, 5 Gilm. 130; *Headen v. Rust*, 39 Ill. 186; *Darling v. Rodgers*, 7 Kan. 592; *Larkin v. Taylor*, 5 id. 434; *Union P. R. Co. v. Hand*, 7 id. 380; *Rose v. Bunn*, 21 N. Y. 275; *Bradley v. Buffalo*, 34 id. 427.

Respondents must be free from fault. They cannot support this action partly on their wrong and partly on wrong of appellant. *Munger v. Tonawanda R. R. Co.*, 4 N. Y. 349. The evidence shows that there was no obstruction to prevent cattle from roaming on respondents' premises a great portion of the distance around it.

A. G. P. GEORGE and G. F. COWAN, for respondents.

Cattle within the Territory are not free commoners. The common law has not been changed by the legislature. The right cannot be founded upon custom, as sufficient time has not elapsed to establish a custom.

A party seeking to justify a trespass of his cattle upon the close of another, by reason of a defective fence, which the owner was bound to keep in repair, must show that the cattle entered through or over the defective fence. *Deyo v. Stewart*, 4 Denio, 101; *Melody v. Reab*, 4 Mass. 471; *Colden v. Eldred*, 15 Johns 220.

The cattle were not free commoners, and were not rightfully upon the common adjoining respondents' close. Respondents

were not obliged to fence against them. *Wells v. Howell*, 19 Johns. 385 ; *Stafford v. Ingersol*, 3 Hill, 38.

There is no evidence before this court to show what part of respondents' premises was inclosed.

WADE, C. J. This was an action in the nature of trespass, brought by plaintiffs against defendant, to recover damages, for that defendant's cattle broke and entered the farm or inclosure of plaintiff, and destroyed his crop of growing grain.

The statute under which the action was brought is as follows:

Section 1. "If any horse, mule, jack, jennie, hog, sheep or any kind of neat cattle, shall break into any ground inclosed by a lawful fence, the owner or manager of such animal shall be liable to the owner of such inclosed premises for all damages sustained by such trespass."

A lawful fence, as defined by the statute, is one four and one-half feet in heighth, whether constructed of poles, rails or boards. Cod. Sts. 373, 476.

Upon the trial, the court gave to the jury the following instructions, the giving of which, among others, is assigned as error :

"If you shall find from the proof that either the slough spoken of by the witnesses is used for a fence or inclosure, or any other part of the inclosure is insufficient under the law as I have given you, and shall further find that defendant's cattle did not enter the premises through such insufficient or defective inclosure, but that they did enter the same where the inclosure of the premises was good and lawful as I have defined, then you will find for the plaintiffs, and assess their damages, as you find from the proof they are entitled, not exceeding the amount claimed in the complaint. That if the slough or swamp was not of such a character as to prevent cattle crossing it like that of a lawful fence, yet if the cattle in question did not enter the close of plaintiffs over or through the same, the fact that it was not sufficient to turn cattle and stock will be no defense to the plaintiffs' right to recover, provided you shall find that the cattle entered the premises where the fence was good and lawful that inclosed the same, no matter by whom such fence was owned that inclosed the same. And if the fence of Hall, or any other person adjoining plaintiffs, as a part

of plaintiffs' inclosure, was ever so defective, such defect will be no defense to this action, provided you shall find the defendant's cattle entered plaintiffs' premises where the fence was lawful, as already defined."

This instruction had the effect to add to the statute already quoted, the following words: "*But if such ground is not inclosed by a lawful fence, nevertheless the plaintiffs can recover, provided said animals enter the premises at a point where the fence is lawful.*"

The instruction was evidently given upon the hypothesis that the statute in question could be so construed as to declare that if the animal enters the grounds at a point where the fence is lawful, it shall be presumed therefrom that there was an inclosure, and that the fence surrounding it was of the height and kind required for the entire distance, and that the fence at such point shall conclusively determine the character of the fence around the entire inclosure; and more than this, it shall conclusively determine that the ground was entirely inclosed; and a defense showing that there was no inclosure, or that the fence was unlawful and insufficient, would thereby be excluded.

Can the foregoing words be added to the enactment by judicial legislation or construction, by virtue of the rules that control the interpretation of statutes?

Statutes should be their own interpreter. Courts must look at the language used, and the whole of it, and derive therefrom the intention of the legislature. Where this intention is obvious there is no room for construction. When the language is plain, simple, direct and without ambiguity, the act construes itself, and courts must presume the legislature intended what it plainly says. It is only in the case of ambiguous, doubtful and uncertain enactments that the rules and principles of interpretation can be brought into requisition. It is not allowable to interpret what has no need of interpretation.

This seems to be the settled doctrine of the law, both in England and the United States, as a reference to a few decisions will demonstrate.

In the case of *King v. Inhab. Stoke Damarel*, 7 Barn. & Cress. 563, the court, per BAGLEY, J., says: "I do not know how to

get rid of the words of this section of the act of parliament; and where the legislature, in a very modern act of parliament, have used words of a plain and definite import, it is very dangerous to put upon them a construction, the effect of which will be to hold that the legislature did not mean that which they have expressed."

Says COLERIDGE, J., in *King v. Poor Law Comrs.*, 6 Ad. & E. 7: "The court should decline to mold the language of an act for the sake of an alleged convenience, or an alleged equity, upon doubtful evidence of intention."

PATTESON, J., in *King v. Burrell*, 12 Ad. & E. 468, says: "Every day I see the necessity of not importing into statutes words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulties."

In *Lamond v. Eiffe*, 3 Q. B. 910, the court, per Lord DENMAN, say: "We are required to add some arbitrary words to the section, which would exclude us from acting in certain cases. We cannot introduce any such qualifications, and I cannot help thinking that the introduction of qualifying words in the interpretation of statutes is frequently a great reproach to the law."

And in *Everett v. Mills*, 4 Scott (N. C.), 531, TINDAL, C. J., says: "It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing."

The courts of this country have spoken with equal clearness upon this subject. The court of appeals in New York say in *Newell v. People*, 7 N. Y. 97: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view to its interpretation, the thing we are to seek is *the thought which it expresses*. To ascertain this, the first resort in all cases is to the natural signification of the words employed, in the order and grammatical arrangement in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning which involves no absurdity and no contradiction between the different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the

words declare, is the meaning of the instrument, and neither courts nor legislatures have the right to add to or take away from that meaning."

So in *Bidwell v. Whitaker*, 1 Mich. 469, it is said: "It is only where a statute is ambiguous in its terms that courts exercise the power of so controlling its language as to give effect to what they may suppose to have been the intention of the law-maker. In the statute before us the language admits of but one construction. No doubt can arise as to its meaning. It must therefore be its own interpreter."

In *Bosley v. Mattingly*, 14 B. Monr. 89, the court use this language: "It may be proper, in giving a construction to a statute, to look to the effects and consequences when its provisions are ambiguous, or the legislative intention is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative and not judicial action."

And in *United States v. Fisher*, 2 Cranch, 358, the supreme court of the United States say: "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and, consequently, no room is left for construction."

Applying these principles to the statute before us, is there any reason for attempting an interpretation thereof? Does not the language of the act convey to the mind one, and but one, definite, clear, distinct thought? If a statute can be so framed as to absolutely forbid an interpretation, by reason of its plain, definite and certain meaning, is not this one of that kind?

The act simply provides that "If any horse * * * or any kind of neat cattle shall break into any ground *inclosed by a lawful fence*, the owner or manager of such animal shall be liable to the owner of such *inclosed* premises for all damages sustained by such trespass."

Is there any doubt as to the meaning of this enactment? Is there any ambiguity in the words used in the construction of the sentences? Is there any difficulty in arriving at the intention of the legislature, and do we not know at a glance the thought

intended to be expressed? Does the language involve any absurdity or contradiction, and can there be but one interpretation to the words used? Is it possible to mistake the meaning of the words, "any ground inclosed by a lawful fence," as long as the word "inclosed" contains no mystery, and "a lawful fence" is exactly defined by the statute?

We answer *all* these inquiries, and say there is no doubt, no ambiguity, no absurdity or contradiction, and no difficulty whatever in discovering the meaning of the statute from the words employed in its formation, and hence it must be its own interpreter, and the court is relieved from any duty or responsibility in the matter.

The statute requires that the ground be inclosed with a lawful fence before the right of action accrues, and where it speaks of an inclosure, can we say it means an uninclosed field? When it says a lawful fence, can we say it means no fence at all? From the fact that cattle break and enter the field where the fence is lawful, can we conclusively say from this fact alone that the field was inclosed, and that a lawful fence entirely surrounded it? We think not, and we also think a lawful fence entirely surrounding the ground entered, or some obstruction equivalent thereto, is a condition precedent to the right to bring the action, and hence the instruction to the jury authorizing a recovery in the absence of an inclosure, and, in the absence of a lawful fence, was error. This view of the statute is further sustained by the fact that the second section of the act specially provides a remedy in the case of trespassing animals where the premises trespassed upon *are not inclosed*.

With the *policy* of the statute we have nothing to do; as to the motive of the legislature in enacting it, it is not our province to speak. Whether it is wise or foolish, whether it meets the demands and requirements of the country is a matter for the legislature, and not the courts. It is our duty to execute the will of the law-making power, where they have plainly expressed it, and where their intention is doubtful and obscure, to discover it by the well-known rules of interpretation. If the law is a bad one, nevertheless it should be enforced until the rightful authority repeals it.

It was urged with much force, upon the part of the respondent, that if the inclosure must be entirely surrounded by a lawful fence before a recovery could be had, the statute would defeat itself, for the reason that if the fence varied a hair's breadth from $4\frac{1}{2}$ feet in height at any place, which would very likely occur from the action of frost or other causes, then no recovery could be had, and thus the statute would be inoperative. To this it was replied, by the other side, that unless a lawful fence was required for the entire inclosure, then damages might be recovered in the absence of any fence whatever except on one side of the field; to all of which we say that a reasonable and substantial compliance with the statute is all that can be required, and an immaterial variation in the height of the fence from that of a lawful fence, would not defeat the action.

Holding, as we do, that the statute must be substantially complied with as to the inclosure, and the fence, before a right of action accrues, it is not necessary to determine whether or not the animals named in the statute are free commoners, as they are called, and thereby entitled to roam at large upon the public lands within the Territory.

We have not looked into the statement of the evidence by the appellant or the amendments thereto by the respondent, as the same appears in the transcript, for the reason that such evidence has never been certified to, by the judge who tried the case, as correct; neither is there any agreement by the parties to the same effect, as the statute requires.

Judgment of the court below is reversed, and cause remanded for a new trial.

Judgment reversed.

McCAULEY, respondent, v. GILMER, appellant.

PLEADING IN EJECTMENT—*proper allegations of complaint — sham denials.*

The complaint in this case alleges that plaintiff is seized in fee and entitled to the immediate possession of a certain tract of land; that defendants are in the possession and withhold the same from the plaintiff, and that plaintiff has been damaged in the sum of \$300. The answer denies

the right of the plaintiff to the possession, and the wrongful withholding of the property, and that plaintiff has been damaged. *Held*, that the complaint states a good cause of action; that the answer is sham and irrelevant, and that judgment was properly rendered for the plaintiff upon the pleadings.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J.

E. W. & J. K. TOOLE, for appellants.

The complaint alleges that respondent is "seized in fee" and "entitled to the immediate possession" of the property in dispute. The former allegation is immaterial, and appellants were called upon to answer as to right of possession. *Boles v. Cohen*, 15 Cal. 150; *Stark v. Barrett*, id. 361; *Grady v. Early*, 18 id. 108; *Hubbard v. Barry*, 21 id. 321.

No eviction is charged. The law presumes that appellants were rightfully in the possession. The complaint should state the facts constituting respondent's right of possession, and show a demand for the premises. The allegation of a seizure in fee is a legal conclusion that need not be answered with strictness and certainty.

Our statute does not contemplate judgment upon pleadings in this way. Respondent should have demurred to the answer or moved to strike it out. The conclusions in the answer are not frivolous, although, perhaps, not aptly pleaded. The whole answer must be sham and irrelevant. *Ghirardelli v. McDermott*, 22 Cal. 539; *Gay v. Winter*, 34 id. 161.

The simple allegation of a wrongful withholding is bad. *Payne v. Treadwell*, 5 id. 311.

The right to the remedy of forcible entry, or unlawful detainer, by a disseisor, depends upon the fact of notice to quit and demand. *Payne v. Treadwell*, 16 Cal. 243; *Boles v. Weifenbach*, 15 id. 144; *Collier v. Corbett*, id. 185.

CULLEN & COMLY, for respondent.

The denials raise no material issues, and are insufficient. They deny conclusions of law resulting from facts stated in the complaint. 2 *Estee's Pl.* 660, and cases there cited.

If no adverse title be shown, recovery may be had without showing right of possession. *Wilkes v. Elliot*, 5 Cranch's C. C. 611.

The denial that appellants wrongfully and unlawfully hold possession is an admission. *Busenius v. Coffee*, 14 Cal. 93; *Lay v. Neville*, 25 id. 549.

The right to the possession depends upon the title. *Holden v. Andrews*, 2 Estee's Pl. 225; *Marshall v. Shafter*, 32 Cal. 194.

The answer does not raise the question of adverse possession, or authorize a recovery for appellants upon this ground. *Ford v. Sampson*, 8 Abb. Pr. 332.

The denial of damages does not raise a material issue in this case. The law presumes some damage from every wrongful interference with the property of another, and respondent was entitled to the nominal damages, as the answer showed no claim of right to the premises in dispute.

SERVIS, J. The complaint in this action avers: That the respondent is seized in fee and entitled to the immediate possession of certain land therein described; that appellants are in possession and withhold the same to his damage in the sum of \$300.

The appellants demurred to the complaint for want of sufficient facts therein stated. The demurrer was overruled by the court, and the appellants excepted and thereafter answered, admitting that the title was in the respondent, but denying the respondent's right of possession, the wrongful withholding of the same, and the damages.

The respondent thereupon moved for judgment upon the pleadings, because the answer was sham and irrelevant. The court sustained the motion, and without a trial rendered judgment for the possession to the respondent and damages in the sum of \$1.

I have heretofore maintained, in a dissenting opinion in the case of *Sands v. Maclay*, *ante*, 42, that this mode of practice is improper; but the majority of this court thought otherwise, and the same must be observed as the law until it is reversed. It only remains for us to determine the sufficiency of the pleadings in the case, which consist of the complaint and answer.

Upon an examination of all the authorities which have been

cited by counsel, we are inclined to follow the ruling of the supreme court of California in *Payne v. Treadwell*, 16 Cal. 220. The only facts which are necessary to be alleged in a complaint of this character are, that the plaintiff is seized in fee, or for life, or for years, as the case may be; that the defendant was in the possession at the time of the commencement of the action; and that he withholds the possession of the same. The complaint in the case at bar contains these necessary allegations, and is therefore sufficient for the maintenance of this action.

The answer denies the right of the respondent to the possession, the wrongful withholding thereof, and the damages. These are conclusions of law, which must be derived from the facts that are to be proved, and do not constitute issues joined by pleading. They are, therefore, what the legislative assembly has denominated sham and irrelevant. The judgment of the court below is affirmed.

Judgment affirmed.

COLLIER, respondent, v. FIELD, appellant.

FACTS WHEN RELIEF IS GRANTED AGAINST MISTAKE IN LAW. C. obtained a decree for the foreclosure of a mortgage upon certain mining ground of F., E. and M.; F. paid to C. one-half of the judgment and C. released to him one-half of the mining ground described in the decree; E. and M. agreed orally, that the release of F. should not affect their liability under the decree; the agreement, which an attorney was employed to reduce to writing, in legal effect, through a mistake or ignorance of the law by the writer released F., E. and M. *Held*, that the release to E. and M. should be set aside, and that E. and M. cannot in good conscience retain the advantage acquired under the written agreement.

Appeal from First District, Jefferson County.

THE material facts are stated in *Collier v. Field*, 1 Mon. 612. The judgment was rendered by *SERVIS, J.*

PAGE & COLEMAN, for appellants.

The subject-matter of this case, so far as the foreclosure of the

mortgage is concerned, is *res adjudicata*. The decree rendered October 12, 1871, is a perpetual bar to any further action upon the mortgage. That decree has never been appealed from, modified or reversed.

The mandate and notice of appeal in *Collier v. Field*, 1 Mon. 612, show that the order of the court, refusing to set aside the sale under the decree, was reversed. The meaning of the mandate is clear, and the opinion, therefore, cannot be inquired into. *Skellern v. May*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 341; *West v. Brashear*, 14 id. 51.

The opinion does not inquire into the validity of the judgment. If it did it would be a matter outside of its jurisdiction, and, therefore, void. *Elliott v. Peirsol*, 1 Pet. 340.

A court of equity will not interfere to reform an instrument framed under a mistake of law. 1 Story's Eq. 112, and cases there cited.

The complaint does not show specifically how the instrument is to be reformed. It should state the words sought to be omitted or inserted. The court cannot go back of the release. It was final. The only remedy of the respondent was an action upon the promise, not upon the mortgage or release. *Collier v. Field*, *supra*; *Hosac v. Rogers*, 8 Paige, 229.

The mortgage cannot be foreclosed until the release has been passed upon by the court favorably to respondent.

There was no service upon two of the defendants, and no appearance as to them. They should have been brought into court, or the action dismissed, as to them, before decree.

G. G. SYMES and A. G. P. GEORGE, for respondent.

Metcalf was not served, and no personal judgment was entered against him. Metcalf and Ervine were partners in the property, and executed the note and mortgage jointly.

This court in *Collier v. Field*, 1 Mon. 612, reversed the judgment of the court below for irregularities.

Do the allegations of the complaint support the decree? This is the only question worthy of consideration.

If a person, through mistake of law, parts with a private right of property, a court of equity will grant relief, if the party bene-

fited cannot in conscience retain the advantage gained by the mistake. Kerr on Fraud and Mistake, 398, 399, 409, and cases there cited; *Bigelow v. Barr*, 4 Ohio, 358.

A party may be relieved from liability occurring through his attorney's mistake of law. *Fitzgerald v. Peck*, 4 Litt. (Ky.) 125.

Equity has afforded relief under similar circumstances. *Evants v. Strode*, 11 Ohio, 480; Perry on Trusts, § 184; Kerr on Fraud and Mistake, 400, 413; *Finley v. Lynn*, 6 Cranch, 238.

The complaint is sufficient. 3 Danl. Ch. Pr. 1971, 1972.

WADE, C. J. This was an action brought to set aside a release executed by plaintiff, whereby a certain mortgage and judgment and decree rendered thereon was discharged, and for the foreclosure of such mortgage. The leading question involved in the case is this: When, if at all, and under what circumstances, can courts relieve against mistakes in matter of law, or acts done in ignorance thereof?

The facts, as shown by the record, are briefly as follows: The defendants, Field, Ervine and Metcalf, were jointly and severally indebted to the plaintiff upon certain promissory notes, which were secured by a mortgage upon certain mining ground, which notes were subsequently put in judgment, and a decree of foreclosure rendered. The defendant Field, desiring to be released from said indebtedness, and from the operation of such decree, proposed to pay to Collier, the plaintiff in the decree, one-half the amount of such judgment, provided that Collier would release him from all of said indebtedness, and would release to him one-half of the mining ground mentioned in the decree and mortgage. Collier accepted this proposal, upon the condition that such discharge of Field and the mining ground should not release the co-obligors of Field, viz., Ervine and Metcalf, or in any manner affect their liability upon said judgment and decree. Whereupon Ervine and Metcalf, being present when Field made his proposition, expressly promised and agreed that the release and discharge of Field should not operate as a discharge, as to them, as to such indebtedness, and should not affect their liability upon such decree. Thereupon an attorney was employed to reduce to writing the agreement of the parties, and the following paper was produced:

C. T. Collier, Plaintiff,

agst.

R. B. Field, Wm. M. Ervine, and

W. H. Metcalf, Defendants.

I do hereby certify that the sum of \$1,528.30 has been paid me by R. B. Field this day, and for which sum I do release said Field from all liability on the judgment recovered on the 12th day of October, 1871, and I do further stipulate and agree that the undivided one-half of the mining ground mentioned in a certain decree, signed on the 12th day of October, 1871, is also released, and the title of the same now vests in R. B. Field, said decree having been entered in the above-entitled action. But this stipulation does not release any other parties mentioned in the decree, nor any other property, save and except the undivided one-half of the mining ground.

C. T. COLLIER.

Witness: A. G. P. GEORGE

This instrument, through the carelessness, mistake or ignorance of its draftsman, does not express the agreement of the parties upon the matter in question. It is in legal effect not only a release of Field, but also of Ervine and Metcalf, and this upon the doctrine that a release of one of two or more joint debtors is a release of all. 1 Story's Eq. Jur., § 112; Bacon's Abr., vol. 8, pp. 276-7, *g.*; Story on Promissory Notes, § 425; Chitty on Bills, ch. 9, p. 449; Bayley on Bills, ch. 9, pp. 342, 344; Byles on Bills, 232; *Tuckerman v. Newhall*, 17 Mass. 581; *Benjamin v. McConnell et al.*, 4 Gilm. 536; *Rice v. Webster*, 18 Ill. 332; *Wiggin v. Tudor*, 23 Pick. 444; *Stearns v. Tappin*, 5 Duer, 294; *Hosac v. Rogers*, 8 Paige, 229; *Joy v. Wurtz*, 2 Wash. C. 266.

This discharge of all the debtors was entirely contrary to the intention of the parties, and resulted from their ignorance of the law, or from their mistake, and this action was brought to relieve against this mistake, by so far reforming the release as that it should not operate as a discharge of Ervine and Metcalf, and for a foreclosure of the mortgage as to them.

The question as to when, if at all, and to what extent, a court of equity can relieve against a mistake of law has always been, and still is, a vexed question. The general rule has long been settled, indeed has become a maxim, that ignorance of the law will not furnish an excuse for any person, either for a breach or for an omission of duty. *Ignorantia legis neminem excusat*. The same principle applies to agreements entered into in good faith, but under a mistake of the law. Such agreements are generally held valid and obligatory upon the parties. It is a general proposition that, in courts of equity, ignorance of the law shall not affect agreements, nor excuse from the legal consequences of particular acts, and this rule is fully borne out by the authorities. 1 Story's Eq. Jur., § 111; Broom's Leg. Max. 232; Kerr on Fraud and Mistake, 396, and the authorities cited.

This principle, however, is not of universal application, and to it there are well-defined exceptions, which are as firmly established as the rule itself, and which have been engrafted into the law from time to time to prevent flagrant injustice and unconscionable advantage. To the exception to the general rule, may be referred cases where parties, acting in ignorance of a plain and settled principle of law, are induced to give up a portion of their indisputable property to another under the name of a compromise, in which cases relief will be granted. There are also cases of peculiar trust and confidence which give rise to a qualification of the general doctrine. Likewise cases of surprise, mixed up with mistake of law, sometimes form exceptions to the general rule. In such cases the agreements are unadvised and improvident, and without due deliberation, and are, therefore, held invalid upon the common principle adopted by courts of equity to protect those who are unable to protect themselves, and of whom an undue advantage has been taken. Where the surprise is mutual, there is stronger ground to interfere, for neither party has intended what has been done. They have misunderstood the effect of their own agreements. Contracts made in mutual error, under circumstances peculiar to their character and consequences, seem, upon general principles, to be invalid. 1 Story's Eq. Jur., § 134.

And so where the mistake is of so fundamental a character that the minds of the parties have never in fact met, or where

an unconscionable advantage has been gained by mere mistake and misapprehension, and there being no gross negligence on the part of the plaintiff either in falling into the error, or in not sooner claiming redress, and no intervening rights have accrued, and the parties may be placed *in statu quo*, equity will interfere in its discretion to prevent intolerable injustice. 1 Story's Eq. Jur. 138 (*i*). And this, also, seems to be the rule in England. Kerr, in his treatise upon the law of Fraud and Mistake, says: "If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired. And this position is supported by a reference to numerous English decisions."

The case at bar seems to come peculiarly within the cases last named; indeed, if a case can be conceived where relief should be granted to defeat an unconscionable advantage gained through mistake in matter of law, this case must be of that kind.

The legal effect of the release to Field is a surprise alike to Collier, and to Ervine and Metcalf, and it defeats the express agreement between the parties. Ervine, Metcalf, Collier and Field enter into an agreement wherein it is stipulated that Field, upon the payment of \$1,528.30, shall be released from the judgment and decree; and it is further expressly promised, upon the part of Ervine and Metcalf, in consideration of such payment by Field, and his discharge, that such discharge of Field shall in no manner impair said judgment and decree as to themselves. The instrument drawn up to carry this agreement of the parties into execution does, in fact, release Ervine and Metcalf, and it would be a reproach to the law if this mutual mistake cannot be cured. They have paid nothing on the judgment. Half of it was paid by Field, and the balance remains unpaid, and they now seek to take advantage of a pure mistake in matter of law in order to be relieved from the payment of an honest debt. They cannot, in good conscience, retain the advantage they have acquired. It would be simple robbery, in the name of law, to per-

mit them thus to escape the consequences of their solemn obligations.

The authority and jurisdiction of a court of equity to relieve against a mistake in matter of law of this character seems to be undoubted, and we grant the relief herein demanded without hesitation, when, in so doing, we are satisfied that we are but carrying into effect the express agreement between the parties.

Judgment affirmed.

RUFF, respondent, v. RADER, appellant.

JURORS FORMING OPINIONS GUILTY OF CONTEMPT. Persons, who have been summoned to attend court as jurors, commit a contempt of court by talking with litigants and forming an opinion upon the merits of their cases.

FACTS RENDERING A JUROR INCOMPETENT. A juror testifies, when examined respecting his qualifications to serve, that he has formed an opinion concerning the merits of a case by talking with one of the parties and believing what he said regarding it; that he cannot say that it is an unqualified opinion; that sufficient evidence would change his opinion; that he thinks he can render an impartial verdict; and that his opinion is dependent upon the truth of what he had heard. *Held*, that said juror is not competent to sit in the trial of the case.

AN "UNQUALIFIED OPINION" BY JURORS. A juror, who hears and accepts as true the statement of a case by a party or witness, forms an "unqualified opinion" within the meaning of the 198th section of the Civil Practice Act.

EXAMINATION OF WITNESSES—leading question. The following question is not leading: "State if, at any time during the summer of 1872, you had any transaction relative to the sale of a cabin to the plaintiff; if so, state what such transaction was?"

PRACTICE—error cured by subsequent ruling. The error of the court in excluding a question propounded to a witness, is cured by allowing the witness to answer another question of the same character.

CASE AFFIRMED. The case of *Isaacs v. McAndrew*, 1 Mon. 437, holding that claims for labor do not bear interest, unless there has been unreasonable and vexatious delay, affirmed.

Appeal from First District, Jefferson County.

THE cause was tried before SERVIS, J.

CHUMASERO & CHADWICK, and A. G. P. GEORGE, for appellant. The court erred, in impaneling the jury, in refusing to allow

the twelve jurors to be sworn generally as to their competency. Civ. Pr. Act, §§ 197-199; *Watson v. Whitney*, 23 Cal. 378.

The court erred in overruling the appellant's challenges to jurors who disclosed, by their answers, that they were not qualified. Civ. Pr. Act, § 198; *White v. Moses*, 11 Cal. 68.

The court should have compelled respondent to elect whether he would rely upon an express contract or a *quantum meruit*. *Simonton v. Kelly*, 1 Mon. 366.

The court erred in refusing to allow appellant to ask the question relating to the sale of the cabin. The question is proper in form and substance. The court erred in dictating a question of its own.

The court erred in allowing the jury to compute the interest on the amount found due. The pleadings and evidence show that respondent was not entitled to interest.

PAGE & COLEMAN and G. F. COWAN, for respondent.

In selecting a jury in a civil action, challenges to the favor were not allowed at common law to the extent authorized by our statute. 3 Bl. Com. 363. Our statute, which increases the number of such challenges, is in derogation of the common law and must be strictly construed. The court should overrule such challenge to a juror unless proof is made to the court by the favor, or otherwise, that the juror is plainly within the statute. Civ. Pr. Act, § 198. Not one of the jurors challenged is within the statute.

The question as to when interrogatories may be leading is within the sound discretion of the court, and is not ground of error on motion for a new trial. 1 Greenl. Ev., §§ 435, 437; 2 Phillips' Ev. 891, n. 570. The refusal to allow the question worked no injury to appellant.

WADE, C. J. The questions presented by this record relate principally, to the impaneling of the jury.

1. It appears by the bill of exceptions that a jury of twelve persons was called and took their seats in the jury box, whereupon the defendant, by his counsel, and before any challenge had been made, requested the court that the jurors be sworn to answer

questions touching their qualifications and competency as jurors in the cause, which request was refused, for the reason, as it appears, that only such jurors should be sworn as to competency as were challenged for cause, and that this challenge should be made without any preliminary examination. This action of the court is assigned as error.

Among other challenges to jurors at common law, were challenges *to the favor*, where a party objected to some probable circumstance of suspicion, as acquaintance and the like, the validity of which was left to the determination of *triors*. Our statute has preserved this right to the parties, and provides that challenges for cause may be taken upon the following grounds. Cod. Sts. 66, § 198.

* * "Sixth. Having formed or expressed an unqualified opinion or belief as to the merits of the action. Seventh. The existence of a state of mind in the juror evincing enmity against, or bias to, either party."

This is but the common law enacted into a statute, and is one of the safeguards thrown around a party when he comes into court, which protects him alike from the dangers resulting from the preconceived opinion which sometimes resists and defies the strongest evidence, and from that enmity or prejudice against, or bias in favor of, either party which invariably inclines us to reward our friends and to punish our enemies when clothed with a little brief authority, or at least so blinds and distorts our judgment that its conclusions are liable to be erroneous.

This bias or prejudice may exist and control the mind of the juror, and he be entirely unconscious of it, and for this reason the law presumes it to exist in certain cases, as consanguinity and the like, and disqualifies the juror without any inquiry whatever. And the law also guards the party against the preconceived opinions of the juror, for though he may declare that he has formed an opinion in the case, from hearing the facts and circumstances stated by a party or a witness, but that he can put away this opinion and try the cause upon the testimony as it is produced in court; yet if he believes the facts upon which his opinion is founded, he has no business in the jury box. Men may put away their opinions, if such a thing were possible, but opinions once

formed, even though erroneous, cling to us and exert an influence when we do not know it, and it requires much more testimony to eradicate and re-form them correctly than would be necessary if the subject were entirely new. That is to say, a juror, with an opinion already formed in a case, would not be likely to arrive at the same results, upon the same testimony, as if he had no opinion when the testimony was presented. It must require some testimony to remove the opinion already formed, and the amount necessary for this purpose will depend upon the nature of the belief upon which the opinion is founded. And to permit a juror to remain in the box with an opinion already formed as to the merits of the case, would require a party to overcome not only the testimony of his opponent, but he must also destroy the preconceived judgment of the man who is to render a decision in the cause, and such a task, in the majority of cases, would be entirely hopeless.

But the question herein presented is: How shall the party ascertain whether or not the juror has formed or expressed an opinion in the case, or whether or not he has such an enmity against or bias toward either party as would disqualify him under the statute? No statute in the Territory expressly requires the jury to be sworn to answer touching their qualifications or competency as jurors, yet a practice has universally prevailed here, ever since the organization of the Territory, in the formation of a jury, to call twelve men into the box, and have them sworn to answer concerning their competency to serve as jurymen in the cause then pending. This is not the precise mode of the common law, but the same result is reached, and each juror is put upon his oath concerning his bias or prejudice, his opinions, his interest, etc. And this practice seems to be contemplated by the statute. The party is given the right to challenge for cause in certain cases, and upon certain grounds. How is he to ascertain the existence of the grounds for challenge until he has examined the juror upon his oath, and how is he to learn that each juror is qualified, and not incompetent, until he has inquired of each one separately and singly as to his qualifications? If a juror has formed an unqualified opinion as to the merits of the case, or, if he is biased toward or prejudiced against either party, how can

this be made to appear until he is examined upon his oath, concerning his opinions, and touching his state of mind toward either party? Must he blindly guess that certain jurors in the box have formed their opinions, or are biased or prejudiced, and challenge them for these causes, and then have an examination? The formation of opinion, or the bias, prejudice or enmity may be entirely unknown to either party until disclosed upon the examination, and, if the challenge must precede the examination, a jury thus impaneled might be composed of men entirely disqualified, and neither party would have the means of showing the fact. Suppose, again, that the juror is interested in the event of the action, or in the main question involved therein, or that he is related within the third degree to either party, or that he stands in the relation of master or servant, employer or clerk, principal or agent to either party; or is a partner in business with either party, a silent partner for instance; or is a member of the family of either party, or is security on any bond or obligation for one party or the other, how are any one or all these things to be known until an examination is had? The existence of any one of these facts disqualifies the juror by the terms of the statute, and yet, unless each juror is examined upon his oath touching these matters, a jury might be made up of men not entitled to serve in that capacity. If the challenge must precede the examination, then the only safe course in practice would be to challenge each juror separately for each cause of challenge enumerated in the statute. The much better practice, and the only safe mode of proceeding, is to administer an oath generally, to the twelve men in the jury box, to answer such questions as may be put to them concerning their competency as jurors in the cause then pending, and, if such examination discloses a cause for challenge, then is the proper time to exercise the right.

2. The next question pertains to the qualifications and competency of a jurymen, and it arose in this manner, as shown by the record: The defendant challenged one White, a jurymen called in the cause, who, being sworn, after challenge, and examined, testified as follows: "I have formed and expressed an opinion as to the merits of the action; cannot say whether it is an unqualified opinion or not; I have talked with the plaintiff both before

and since the commencement of this suit, and during this term of the court; from what he and others told me about the case, I formed my opinion; my opinion might be changed by sufficient evidence; my mind is so now that I think I could render an impartial verdict; it would take considerable evidence to remove my opinion; the conversation I had with plaintiff during this term of court was, that he wanted me as a witness, and asked me if I did not know he was a good hand to work." The defendant then challenged the juror for cause. Whereupon the court asked the juror whether or not his opinion depended upon the truth of what he heard. The juror answered that it did, and further stated that he *believed* what the plaintiff had told him about the case. The court then overruled the challenge, and the defendant excepted. Five other jurymen were challenged for cause by the defendant, and their examination disclosed a similar state of facts as the examination of the jurymen White, showing that they had formed an opinion in the case, from talking with the plaintiff before or during the term of court, and that they believed what the plaintiff had said to them about the case, which challenges were overruled and exceptions saved.

Before entering upon a discussion of the questions herein, we wish to say that jurors summoned to attend court in that capacity, who will talk with parties having causes for trial about their causes, and thereby form an opinion of the merits of the cause, are guilty of contempt of court, and should receive the highest punishment therefor, and a party who would approach a juror and talk with him out of court about his case, is likewise guilty of contempt, and should be punished accordingly. Such conduct shows corruption of the gravest character, or gross ignorance, amounting to criminality.

The examination of these jurors as to their competency showed that they had formed an opinion as to the merits of the case, by listening to what the plaintiff had said to them concerning it, and that they believed what the plaintiff had said, but that their opinions depended upon the truth of the plaintiff's statement. Were they competent, under our statute, to hear and determine the case upon the testimony? They enter the box with an opinion as to the merits of the case, formed from statements of the plaintiff made

to them out of court, which statements they believed to be true, and declaring that it would require considerable testimony to remove the opinions they had formed. In other words, they had tried the case out of court, and had their minds made up as to how it should be decided, but were willing to be convinced that the plaintiff's statements were untrue, although they did not doubt their absolute truth.

The human mind is so constituted, and we cling so tenaciously to our first impressions and formed opinions, that, under the circumstances disclosed, the trial in court would almost invariably result in the same decision as the former trial out of court, no matter how overwhelmingly the testimony might preponderate against it. But we wish to test the competency of these jurors by the requirements of the statute. The 198th section of the Code provides that either party may challenge jurors for cause, if they have formed or expressed an unqualified opinion or belief as to the merits of the action, and in order to try these jurors as to their competency under the statute, we must first determine *what is an unqualified opinion or belief*.

These jurors testify that they had heard the plaintiff state his case, that they *believe* his statements to be true, and thereupon formed their opinion. Were such opinions qualified or unqualified? What is an unqualified opinion? We form opinions from what we see and what we hear. We arrive at conclusions, reasoning from what we know, or believe we know. Opinions and beliefs are formed by reflection. Certain facts are believed to exist, and our opinions are the conclusions resulting therefrom, and if we implicitly believe the facts, our conclusions or opinions derived therefrom are unqualified; but if we doubt the facts, our conclusions are likewise doubtful and our opinions qualified to this extent. We do not know much of any thing absolutely. Very few of our opinions are derived from perfect knowledge, and if only such knowledge produced unqualified opinions, then most of our conclusions would be tainted with doubt. But an absolute belief in the truth of certain facts makes them true to us, however unreasonable and untruthful they may be to others, and our opinions formed therefrom must partake of the same character as our belief in the facts, and therefore be absolute and

unqualified. So then we say that an implicit, undoubting belief in a statement purporting to be fact necessarily engenders an unqualified opinion, while a doubt as to the fact causes the opinion to be qualified.

The opinions of mankind depend upon their belief or disbelief, and however erroneous the belief may be, yet the opinions resulting therefrom are qualified or unqualified, as is the belief in the facts upon which the opinion depends. The absolute truth or falsity of the alleged facts is not material. What we undoubtedly believe is true to us, however false it may be to others. An unqualified, undoubting belief in certain supposed facts, therefore, makes an unqualified opinion thereon; the latter results necessarily from the former, and although the opinion may be all wrong in the absolute, nevertheless it is true to us and unqualified, if we believe in the facts upon which it rests. Therefore, a juror hearing a statement of a case from a party or a witness, and believing the same to be true, and having no doubts as to the verity of the statement, must necessarily form an unqualified opinion as to the merits of such case, and an opinion thus resulting, and thus formed, disqualifies him, for the reason that before entering the box he has already tried the case in his own mind and determined it to his own satisfaction, and very likely, when he heard the testimony in court, would undertake to make the same harmonize with his opinion already formed.

Applying this to the jurors who had testified that they had formed an opinion in the case; that they had heard the statements of the plaintiff, and did not doubt the truth of what he said to them, and thereupon formed an opinion as to the merits, and we do not question that such jurors were incompetent to serve in the case; and the statement of the jurors that their opinions depended upon the truth of what the plaintiff told them, does not change or vary the application of the rule, since they further state *that they did in fact believe* the statements of the plaintiff.

3. This was an action brought by the plaintiff to recover for work and labor performed by the plaintiff for defendant, under and by virtue of a certain contract between the parties.

The defendant, in his answer, among other things, set up a counter-claim, and alleged that the plaintiff was indebted to him

in the sum of \$40, by reason of a certain cabin sold and delivered to the plaintiff by the defendant, to which the plaintiff replied, denying that he purchased a cabin of defendant, and denying any indebtedness on account thereof.

During the progress of the trial, the defendant was sworn as a witness, and the following question propounded to him by his counsel: "State if at any time during the summer of 1872 you had any transaction relative to the sale of a cabin to the plaintiff; if so, state what such transaction was?" The plaintiff objected to the question, upon the ground that it was leading, and the court, understanding the same to be leading, sustained the objection, and directed the counsel what question to put, to which ruling of the court there was an exception.

Directing our attention to the issue being tried, which was whether or not the defendant had sold to the plaintiff a certain cabin, we can see no possible objection to the question asked the witness. It is not leading; it does not suggest any answer; it does not assume any fact to exist which is in controversy; it cannot be answered by a simple affirmation or denial; it was pertinent to the issue being tried. It directed the attention of the witness to the subject upon which he was to speak, and this is always proper, but we cannot discover wherein the answer sought, is suggested, or by what rule the question is leading.

Under certain circumstances leading questions may be put by direction of the court, and this action cannot be assigned as error, but that is not this case. Here we understand the record to state that the question was excluded because of its leading character. The reason for its exclusion is wholly immaterial, if it was properly excluded, but we hold that the question was pertinent to the issue, and proper in form, and, being so, the counsel had the right to put it in his own language without dictation from the court. The proof must correspond with the averment, and support it, and the question propounded tended directly to this result, and was unobjectionable in form. But no error occurs in this branch of the case, for the record shows that the court permitted and directed the witness to answer a question of precisely the same import and character as the one objected to. A case can only be

reversed for substantial errors, and not by virtue of astute catch-penny tricks of counsel.

4. As to the computation of interest upon the amount found due from defendant to plaintiff, the case is controlled by that of *Isaacs v. McAndrew*, 1 Mon. 437, where it is held that indebtedness of this character does not bear interest under the peculiar wording of our statute.

For these reasons the judgment below is reversed, and the cause remanded for a new trial.

Judgment reversed.

KNOWLES, J. I concur in the opinion as to the second and third points discussed therein. As to the first point, I express no opinion.

SERVIS, J. I dissent from the holding of the court as to the first proposition, and concur in the remainder.

HIBBARD, respondent, v. TOMLINSON, appellant.

CASE AFFIRMED. The case of *Rader v. Nottingham*, ante, 157, holding that no appeal lies from an order overruling a motion to re-tax costs in the district court, affirmed.

MOTION TO RE-TAX COSTS. A motion to re-tax costs must be supported by the records of the case, or affidavits, or a statement showing the illegal charges.

STATUTORY CONSTRUCTION — COSTS. The 417th and 551st sections of the Civil Practice Act regulate costs on appeal, and must be construed together.

COSTS ON APPEAL FROM PROBATE TO DISTRICT COURTS. In an action for the claim and delivery of personal property, the party who appeals to the district court from a judgment rendered against him in the probate court for the wrongful detention of the property, and reduces the amount of the damages more than \$10, is not entitled to his costs on the appeal.

Appeal from First District, Gallatin County.

THE judgment was rendered by SERVIS, J.

S. WORD and PAGE & COLEMAN, for appellant.

The only question raised by appellant is the taxation of the costs. The judgment against appellant in probate court was \$280.42; in district court it was \$1 and costs. The court erred in refusing to tax all the costs on the appeal against respondents. Civ. Pr. Act, § 417.

The court erred in refusing to re-tax costs taxed illegally in probate court. *Votan v. Reese*, 20 Cal. 90.

Respondents failed to recover judgment in district court for \$50. Civ. Pr. Act, § 546.

The appeal from the probate to district court was a new trial in its effect upon costs. *Wendell v. Lewis*, 8 Paige, 613.

Appellant was entitled to costs under the statute. Civ. Pr. Act, § 417. He reduced the judgment appealed from more than \$10. This is the intention of the law.

The question of allowing costs in this action is not a matter of discretion with the court. It is governed by the statute. It does not come within section 551 of the Practice Act. It is not a case in which the judgment has been modified. Appeals from probate courts must be tried *de novo*. This case has been tried *de novo*, and judgment of probate court has been reduced \$280. This reduction is equivalent to the recovery of this sum by appellant, and should entitle him to recover his costs on appeal.

The appeal from the probate court is from the whole judgment therein rendered. If the costs of that court form a part of the same, the appellate court should correct the judgment.

J. J. DAVIS and C. W. TURNER, for respondents.

This appeal should be dismissed; it is taken from orders which are not appealable. Civ. Pr. Act, § 369; *Lutsky v. Davis*, 33 Cal. 678. No errors are assigned against the judgment.

The verdict for respondents was general, and respondents should have judgment for all they claim, except special damages. Civ. Pr. Act, §§ 215, 217, 237, 240.

Appellant never sought to correct the costs when the case was in the probate court. He should have moved to re-tax the same before he appealed to the district court. Civ. Pr. Act, § 418;

Wendell v. Lewis, 8 Paige, 617. The record does not show any illegal costs in the probate court.

KNOWLES, J. The notice of appeal in this case sets forth that the appeal is taken from the order overruling the defendant's motion for judgment for costs. Also, that they appeal from the order overruling their motion to re-tax costs taxed in the probate court. Lastly, the notices specified, "That the defendants appeal from the whole of the judgment rendered against them in said cause, in said district court, on the 1st day of November." Upon an examination of the record we find that the judgment determining the merits of the case was entered November 1st, 1873. In the case of *Rader v. Nottingham*, ante, 157, we held that no appeal lies under our statutes from an order overruling a motion to tax or re-tax costs. Our statutes regulate appeals, and there is no right given of appeal in them from an order overruling a motion to tax or re-tax costs. There being no appeals from such orders, this court has no jurisdiction to review the question raised by them when appealed from.

The appeal from the judgment on the merits of the case, however, properly brings these orders before us for consideration.

From the record it appears that there was a motion to re-tax the costs which had been adjudged in the probate court, and also a motion to tax all of the costs of appeal to the plaintiff, for the reason that the defendants in the district court reduced the judgment of the probate court in the district court more than \$10. There is nothing presented to this court in the record, or set forth in the motion itself, to re-tax the costs allowed in the probate court, that shows wherein either the probate court committed any error in taxing these costs, or the district court in overruling the motion to re-tax them. There is nothing in a motion to re-tax costs that requires that it should be entertained without some showing to support it. A motion to re-tax costs should always be supported, either by the records in the case, or by affidavits showing the illegal charges, or by a statement presenting them. Something must be presented to the court that will show that some charges have been improperly allowed as costs. From the order presented in the record, overruling the motion to re-tax costs in the probate court,

we are led to infer that the court below based his ruling upon these considerations. They come to us with equal force, and hence we sustain the ruling of the court below in this particular.

In considering the second motion, we are met with section 417 of our Practice Act, which provides: "If the party appealing to the district court, as provided in this act, shall fail to reduce or enlarge the judgment appealed from, \$10 or more, or reverse the same in said district court, he shall not recover any of the costs of appeal."

It is claimed that, by restricting the appellant from recovering costs, unless he enlarge or reduce the judgment appealed from \$10, by necessary inference, if he does enlarge or reduce the judgment that amount, he would be entitled to a judgment for his costs. This is a negative statute prohibiting costs, and there are no rules for the construction of statutes that would allow a negative statute to be construed as an affirmative one. In Sedgwick's Stat. and Const. Law, 40, upon the subject of Negative Statutes, I find this: "The different operation of affirmative and negative statutes," says Mr. Dwaris, is thus illustrated: "If a statute were to provide that it should be lawful for tenant in fee simple to make a lease for twenty-one years, and that such lease should be good, this affirmative statute could not restrain him from making a lease for sixty years." The enacting of such a statute would lead to just as strong an inference that a lease for more than twenty-one years would not be lawful, as a statute that prohibits costs on appeal, unless a judgment is reduced or enlarged \$10, gives costs when that is the case. In this same authority the rule is laid down that, in order to prevent a person from making a lease for more than twenty-one years, there must be negative words in the statute prohibiting it. The legal effect of a negative statute is to take away some former right that existed at common law, or to repeal or modify some previous statute. Sedgwick's Stat. and Const. Law, 40. What rights, as to costs, did the appellant have at common law? At common law no costs, as costs, were allowed. There were some English statutes that gave costs, which would be enforced with us, but these do not touch a question of this kind. 2 Bac. Abr. 484. This statute, then, could not be a restriction or modification of a common-law right.

Section 551 of our Practice Act is as follows: "In the following cases the costs of an appeal shall be in the discretion of the court: First, when a new trial is ordered; second, when a judgment is modified." This statute, and that of section 417, are in *pari materia*. They refer to the same subject — costs on appeal. In construing statutes, where the intention of the legislative assembly is doubtful, all statutes in *pari materia* shall be taken and construed together as one system, and as explanatory of each other. Sedgwick's Stat. and Const. Law, 247.

Taking these two statutes together, and the meaning of section 417 becomes apparent. By section 551, in all cases of this kind the taxing of costs is discretionary with the court. Section 417, however, modifies this discretion, and says that unless the appellant shall enlarge the judgment he appeals from, if it is in his favor, \$10 or more, or, if it be against him, and he fails to reduce it \$10 or more, then he shall not recover his costs on the appeal. And, as the common law gives no costs in such cases, he cannot recover any under its rules. And, as the statute gives him no costs, it is evident he cannot recover them. With this view of the statutes under consideration, it is apparent that, in this case, the taxing of costs rested in the sound discretion of the court below. It is not claimed that there was any abuse of this discretion. Upon the examination of the record in the case we are unable to perceive that there was any. The main issue in this case was the right to certain property. It was impossible for the court to find what amount of the costs in the case were made in reducing the judgment for damages and what amounts were made in trying the main issue. It would not be just for the appellant to gamble for a verdict on the main issue, and put the respondent to great costs on this issue, and then, because he reduced the judgment for damages, which was merely incidental to the main issue, \$10 or more, he should have judgment for all of his costs, on appeal. We find no error in the court in overruling his motion therefor.

Judgment of the court below affirmed, with costs.

Judgment affirmed.

ORR, appellant, v. HASKELL, respondent.

NEW TRIAL — *grounds requiring affidavits.* A motion for a new trial for the causes of irregular proceedings, which prevented a new trial, and accident and surprise, will be refused if it is not made upon affidavits, as required by the 234th section of the Civil Practice Act.

SAME — *verdict against evidence.* A new trial will not be granted for the cause that the verdict is against the evidence, unless it appears clearly that the jury erred.

PROOF OF MINING RULES — *examination of, by jury.* A book containing the rules and regulations of the miners of the district, in which the mineral land in controversy in this action was located, was competent evidence under the 504th section of the Civil Practice Act, and the jury had the right, under the 207th section of the Civil Practice Act, to take said book to their room, upon retiring for deliberation.

PRACTICE — *objection to answer after verdict.* After the verdict has been returned, a party cannot complain for the first time that the denials in the answer are insufficient.

CASE AFFIRMED. The case of *Marden v. Wheelock*, 1 Mon. 49, holding that issues of law are waived after the trial upon the facts, affirmed.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J. The following sections of the Civil Practice Act are referred to in the opinion:

“In actions respecting mining claims, proof shall be admitted of the customs, usages and regulations established and in force in the mining district embracing such claim; and such customs, usages and regulations, when not in conflict with the laws of this Territory, shall govern the decision of the action.” Civ. Pr. Act, § 504.

“Upon retiring for deliberation, the jury may take with them all papers (except depositions), accounts or account books, which have been received as evidence in the case.” Civ. Pr. Act, § 207.

TOOLE & TOOLE, for appellant.

The denials in the conjunctive in the answer admit that appellant was the owner and seized in fee of the premises in controversy. 2 Estee's Pl. 657, 781, and cases there cited; 3 id. 48, 665, and cases there cited. The statute provides that every material

allegation in the complaint, not specifically denied in the answer, shall be deemed admitted on the trial. Civ. Pr. Act, § 65.

The answer does not deny appellant's right of possession, and right of possession is sufficient to maintain the action. No abandonment or forfeiture is pleaded. These defenses must be pleaded specially against a seizure in fee, when prior possession is not denied. There is no evidence of abandonment.

Was there a forfeiture under the laws of the district? No forfeiture can be had, if the laws do not provide for it; forfeitures are odious in law and never occur by implication. *McGarrity v. Byington*, 12 Cal. 426; *English v. Johnson*, 17 id. 117; *Bell v. Bed Rock T. & M. Co.*, 36 id. 214.

No adverse possession is claimed during the time limited by the statute, and the statute of limitation is not relied on.

The property once admitted to be in appellant can only be lost by gift or sale, abandonment, forfeiture or adverse possession. Nothing of this nature is proved.

The new matter in the answer does not show adverse possession. 2 Estee's Pl. 23, 26, 912, 929, and cases there cited.

The admission of the mining laws in evidence, for the jury to construe, is error. *Fairbanks v. Woodhouse*, 6 Cal. 433; *Dutch F. W. Co. v. Mooney*, 12 id. 534.

The record shows the ground in dispute was laid over May 14, 1870, and respondents jumped it on the 20th following. On this account they were trespassers and their action could not ripen into a right.

G. G. SYMES and CULLEN & COMLY, for respondents.

Appellant's objections to the sufficiency of the answer come too late. He went to trial as if the denials were good and conducted his side as if every allegation of the complaint was denied. Appellant thereby made the denials good and sufficient. *White v. Spencer*, 14 N. Y. 247; *Wall v. Buffalo W. Works*, 18 id. 119; *Elton v. Markham*, 20 Barb. 343; *Seely v. Engell*, 3 Kern. 542; *Daniels v. Andes I. Co.*, ante, 78.

The assignment of errors by appellant is wholly insufficient. *Griswold v. Boley*, 1 Mon. 545.

The grounds alleged for a new trial, which require affidavits, must be disregarded. They are not supported by affidavits. Civ. Pr. Act, § 234.

Appellant failed to comply with the rules of the district, and the jury could reasonably find an abandonment therefrom. *King v. Edwards*, 1 Mon. 235; *St. John v. Kidd*, 26 Cal. 264.

Abandonment need not be pleaded, but is admissible under a denial of title. *Bell v. Bed Rock T. & M. Co.*, 36 Cal. 214; *Willson v. Cleveland*, 30 id. 192.

The book containing the mining laws was properly admitted in evidence. Civ. Pr. Act, § 504. This book is the best evidence of the existence of the written rules.

SERVIS, J. This was an action to recover possession of certain placer mining ground described in the complaint as situate in "Helena Hill District, Lewis and Clarke county, Montana Territory." The complaint also alleged that plaintiff was the owner thereof, and seized in fee; that defendants ousted him from the possession and wrongfully and unlawfully withheld the same.

The defendants, by answer, substantially denied all the allegations of the complaint, and averred that *they* were possessed of and the owners of 600 feet of the property in question, describing the same.

Upon this state of the pleadings, and without objection, the parties proceeded to trial to a jury. After the plaintiff had rested, the defendants, amongst other evidence, offered a book containing the rules and regulations of the miners in said Helena Hill mining district, which the court admitted over the objection and exception of plaintiff.

After the defendants had rested, the court instructed the jury precisely as requested by the respective parties, and without objection or exception by either; and the jury rendered their verdict for the defendants. Whereupon the plaintiff moved for judgment *non obstante veredicto*, which the court overruled, without objection or exception.

The plaintiff then moved for a new trial on the following grounds, viz.:

1. Irregularity in the proceedings of the court, by which plaintiff was prevented from having a fair trial.
2. Accident and surprise, which ordinary prudence could not guard against.
3. Insufficiency of the evidence to justify the verdict, and that the same was against the law.
4. Errors of law occurring at the trial and excepted to by plaintiff.
5. Error of the court in admitting and submitting miners' rules, regulations and customs to the jury.
6. That the verdict is against the law and the evidence.

So far as respects the first two errors assigned, this court cannot consider, as the same is not supported by affidavits, as required by the 234th section of the Code.

As to the third and sixth errors assigned, which are of one and the same import, viz. : Insufficiency of evidence to warrant the verdict, and that the same is against the law of the case, we will consider together.

The law of the case was substantially embodied in the instructions given to the jury, which were given in the precise language as requested by the respective counsel ; and while I do not either admire or practice this mode of giving instructions to a jury, yet, as there was no objection or exceptions taken to the instructions as given, we fail to see wherein the verdict was contrary to the law of the case.

As to the insufficiency of the evidence to support the verdict, upon an examination thereof, as presented by the record, we find the same did, without objection thereto, at least tend to show that the ground in controversy was a part and parcel of the public domain ; that it was situate within a regularly organized mineral district ; that the tenures and possession of mining claims therein were subject to the then existing rules and regulations of *that* district ; that the ground in controversy was vacant in 1869 and 1870 ; that plaintiff had not complied with the rules of the district, which was thereby an abandonment of any right he might have had thereto ; that defendants, finding the same so vacant and abandoned, located the same and thereafter complied with the rules of said district, whereby to entitle them to the sole and ex

clusive possession of the same; and further, that although the plaintiff could not, in the fall of 1869, procure water wherewith to work and represent the same, yet in the spring of 1870 he could, as defendants and others did, procure such water. With such proof tending to controvert the plaintiff's claim, and establish the defendants', this court cannot here say that the verdict was contrary to the evidence, of which the jury alone were the judges of its weight and credibility. It must be *clear* that the jury has erred before a new trial will be granted, on the ground that the verdict is against the weight of the evidence or unsupported by it. And if this is the rule, as it undoubtedly is, even in the court where the cause is tried, and before whom the witnesses appear and testify, *a fortiori*, ought it to be the rule, when another court decides the motion for a new trial, with no other knowledge of the facts than is derived through the imperfect medium of a written statement.

As to the fourth and fifth errors assigned, they, too, are of one and the same import, viz., the error of the court admitting the book of miners' rules and regulations as evidence, and submitting and permitting them to be taken and considered by the jury in their room.

The admission of the miners' book of rules and regulations of the miners in that district, we think, under section 504 of the Civil Practice Act, was competent, and when so admitted it was proper for the jury to take the same with them to their jury room, as provided by section 207 of the Practice Act.

The plaintiff's counsel, however, with much force and the support of numerous authorities, insist that the answer of the defendants is insufficient to form an issue or to support the verdict.

The answer, it is true, is not as specific and void of negative pregnant as good pleading might require; yet, as no advantage was taken of it, either before or upon the trial, we think the objection comes too late after verdict; and the authorities cited by the defendants' counsel, as well as the holdings of this court in the case of *Daniels v. The Andes Ins. Co.*, *ante*, 78, fully sustain this view, especially so, as there is at least one material issue joined with the answer, viz., that of adverse possession, which, although perhaps insufficient in and of itself to form an issue, yet, when

supported by evidence unobjected to, tending to establish such possession, cannot be disturbed after verdict. And this court, in *Marden v. Wheelock*, 1 Mon. 49, has held that all issues of law are waived after trial upon the facts.

We are, therefore, of the opinion that there is no such error appearing upon the record in this case as to warrant a reversal of the judgment, and the same is affirmed, with costs.

Judgment affirmed.

WELLS, appellant, v. CLARKSON, respondent.

PLEADING—*complaint in action to set-off judgments—liability of assignee with notice.* The complaint in this case alleges that C. obtained judgment against W. in July, 1868, for \$5,000 for personal injuries; that W. obtained judgment upon a promissory note against C. in October, 1868, for \$2,673, which is unpaid; that W. paid C. one-half of his judgment in November, 1868; that C., in payment of a pre-existing debt, assigned to M., in July, 1868, one-half of his judgment against W., which is unpaid; that M. had full notice at the time of the demand of W. against C., which had been owned by W. since December 2, 1867; that C., during these times, was and is insolvent, and that the sheriff has executions upon the judgments in favor of M. against W. and W. against C. W. prays that his judgment may be set off against the judgment entered for C. M. demurred. *Held*, that the complaint states facts sufficient to constitute a cause of action. *Held*, also, that W. has the right to set off his judgment against that assigned to M. *Held*, also, that M. is not a *bona fide* purchaser of the judgment against W., and holds the same subject to the right of set-off by W.

Appeal from Third District, Lewis and Clarke County.

THE demurrer was sustained by WADE, J.

W. F. SANDERS and E. W. TOOLE, for appellants.

CHUMASERO & CHADWICK, for respondents.

No briefs on file.

KNOWLES, J. The issue in this case is presented on complaint and demurrer. The material facts set forth in the complaint are, that on the 10th day of July, A. D. 1868, Clarkson obtained a judgment against the plaintiff for the sum of \$5,000 damages, and \$524.17 costs, in an action for damages for injuries received through the negligence of the plaintiff, while engaged as a common carrier of passengers; that on the 2d day of December, A. D. 1867, the plaintiff herein had a just demand against the said John M. Clarkson, one of the defendants, for the sum of \$2,673.38, due on a promissory note, and that on the same date the plaintiff instituted suit on said demand, and on the 26th day of October, following, recovered judgment for the full amount of his claim, together with \$20 costs, and that said judgment remains in full force at this date and is unpaid; that on the 19th day of November, 1868, this plaintiff paid the said Clarkson on his judgment \$2,500, leaving the balance of said judgment unpaid; that on the 10th day of July, 1868, Clarkson, in payment of a pre-existing indebtedness to one McGregor, assigned to him the unpaid balance of said judgment against this plaintiff; that at the time of this assignment, McGregor had full notice of the demand of plaintiff, and that at the time Clarkson was insolvent, and still remains insolvent; that McGregor, for his benefit, has caused execution to be issued against the said plaintiff on the said judgment against it, and that plaintiff had caused execution to issue on its judgment against Clarkson, and that both judgments are in the hands of the sheriff of Lewis and Clarke county. Plaintiff asks in this action that its judgment may be set off against Clarkson's judgment. The facts set forth in the complaint are admitted by the demurrer. The court below sustained the demurrer. It was to the effect that the complaint did not state facts sufficient to constitute a cause of action. The ruling of the court upon this demurrer is assigned as error. The question is then presented to us, did the complaint state facts sufficient to constitute a cause of action? The action in which Clarkson obtained his judgment was for unliquidated damages. In that case the plaintiff had no power to set up its claim as a defense. A set-off can be set up only when both demands are choses in action.

As soon as Clarkson obtained his judgment, it then became a

chose in action, and the rule undoubtedly is in an action in equity, that as Clarkson was insolvent the plaintiff had a right to have his demand set off against Clarkson's judgment. This has been termed a natural equity. See *Waterman on Set-off*, 440-464; *Hobbs v. Duff*, 23 Cal. 596; *Hurst v. Sheets*, 14 Iowa, 322; *Isell v. Lucas*, 17 id. 504. McGregor, however, became an assignee of the unpaid balance of this judgment of Clarkson, and this presents to us the question, could he take this judgment freed from this right of the plaintiff, to have his claim set off against the same. It appears in the complaint that McGregor had notice of the claim of plaintiff before he took an assignment of the judgment from Clarkson. McGregor cannot then claim to be a *bona fide* purchaser of this judgment. He had notice of this natural equity of the plaintiff before his rights accrued. This equity was an actual and subsisting one at the time. Under such circumstances a purchaser of property cannot come into court and say I purchased it, under the belief that the vendor had a complete title thereto. Or take the case of this judgment. The assignee cannot say, I took it under the belief that the assignor had a full right to all the money it called for. He knew of this equity which said that the assignor was entitled to only the balance due him after satisfying the claim of the plaintiff. An assignee of a judgment, with notice of an outstanding equitable set-off, is not a *bona fide* purchaser thereof. See *Hobbs v. Duff*, 23 Cal. 596; *Hurst v. Sheets*, 14 Iowa, 325.

But whether or not McGregor had any notice of this equity of plaintiff, as it was a subsisting equity at the time of the assignment, still he purchased it subject to this equity. An assignee cannot be put in any different condition from that of his assignor, unless some fraud has been practiced upon him, or some bad faith exhibited. Although, under our statutes, an assignee may sue and prosecute actions in his own name, that does not place him in any different position otherwise than an assignee before this statute. An assignee of a claim, since assignments have been allowed by law, has always taken his assignment subject to any rights of set-off the person owing the demand possessed at the time of the assignment. In equity, this rule always prevailed whether the right of set-off was a legal or equitable right. *Bush*

v. *Lathrop*, 22 N. Y. 535. This case is a well-considered one, and fully sustains the above doctrine.

The statutes of this Territory provide that the assignment of a thing in action shall be without prejudice to any set-off or other defense at the time of or before notice of the assignment. See Laws of Montana Territory for 1871-2, p. 28, § 5. A judgment has been classed as a thing in action. *Burtis v. Cook*, 16 Iowa, 194; *Isett v. Lucas*, above cited. There might be some doubt as to whether this statute referred to any thing more than a right to set up a set-off or counter-claim upon an action on a chose in action. But in the case of *Hubbs v. Duff*, 23 Cal. 626, the court notices this statute as sustaining the view that a similar statute applies in an action of this nature.

It may be observed, however, that equity follows the law, and that this statute defines the legal status of the assignee.

In this case there was an equitable right of set-off which could be made available in a court of equity only, owing to the nature of the action of Clarkson against plaintiff, and we think the relief the plaintiff asks in this action was proper, and should have been granted.

For these reasons we hold that there was error in the ruling of the court below.

There is nothing in the case of *McGregor v. Wells*, 1 Mon. 142, that asserts any doctrine contrary to that expressed here. The cases we examined, that were cited by the respondent, were not in point. Most of them were cases where the question was presented on motion to set off one judgment against another.

Judgment of the court below is reversed, and the cause remanded.

Judgment reversed

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT

AT THE
JANUARY TERM, 1875, HELD IN VIRGINIA CITY.

Present:
HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. FRANCIS G. SERVIS, }

UNITED STATES, appellant, *v.* CARR, respondent.

INDIAN COUNTRY—*transportation of liquor.* Citizens of the United States and those who have declared their intention to become such, have the right to carry spirituous liquors through the Indian country for the purpose of lawfully selling the same in other places.

Appeal from Second District, Deer Lodge County.

THE action was tried before KNOWLES, J.

M. C. PAGE, U. S. Attorney, for appellant.

SHOBER & LOWRY, for respondent.

SERVIS, J. This was a proceeding instituted by the United States district attorney, upon a libel of information, under the acts of congress relating thereto.

The information alleged, in substance: That, on or about the 24th day of December, 1873, near the Blackfoot Indian Agency, in Deer Lodge county, Montana Territory, and in the Indian country, the United States marshal for the Territory seized ten gallons of whisky, two horses, and other property, in the possession of the respondent; and that the respondent was then unlawfully introducing said whisky into said Indian country.

The answer of the respondent denied the unlawful introduction by him of said whisky into said Indian country, and averred that, at the time of said seizure, he was on his way through the Territory of Montana to Whoop-up in the British possessions; and that he was not seeking to dispose of, or introduce said whisky into any Indian country within the jurisdiction of the United States.

Upon this issue, the case was tried by a jury, that found for the respondent.

The district attorney moved for a new trial, and assigned as grounds therefor:

1. Error of law occurring at the trial.
2. That the verdict was against law.
3. That the instructions of the court were erroneous, and calculated to mislead the jury.

The court overruled the motion, and rendered judgment upon the verdict. From this action, an appeal has been taken to this court.

The record fails to set out any evidence that may have been introduced on the trial of the case, and we are unable to ascertain wherein there was error in the proceedings of the court below. But, assuming that such evidence was given as to call for the instructions, which were read to the jury, we cannot see wherein the court erred in instructing the jury.

The manifest object and intent of the law, under which this proceeding was held, is shown by its title, which is as follows: "To regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers." It was not intended by this act to prohibit the exploration or settlement of the public domain by persons, who were citizens of the United States, or had declared their intention to become such, and might desire to carry with them spirituous liquors for legitimate and lawful purposes. This

would be the case, if the position taken by the district attorney is correct. If, then, such a person passes through the Indian country with spirituous liquors in his possession, without any intent to dispose of the same therein contrary to law, neither the liquors, nor any other species of property accompanying the same, are liable to seizure or forfeiture. Therefore, the judgment is affirmed.

Judgment affirmed.

TERRITORY, respondent, v. FALLIS, appellant.

APPEALS IN CRIMINAL CAUSES. The appellant was indicted at the November term, 1872, and tried and convicted at the June term, 1873; a bill of exceptions was signed, but no notice of appeal was ever given; upon application, the judge refused to correct the bill in vacation and within six months after the rendition of the judgment; the bill was corrected at the following term, more than six months after the judgment had been rendered. *Held*, that this court did not have jurisdiction of the case.

Appeal from Second District, Missoula County.

THE action was tried before KNOWLES, J.

W. J. STEPHENS, for appellant.

J. C. ROBINSON, District Attorney, Second District, for respondent.

SERVIS, J. The appellant, by counsel, files his petition to this court for leave to file a transcript upon appeal from the district court of Missoula county, in this cause. Upon an examination of the record in the action, it appears that, at the November term of said district court, 1872, the appellant was indicted for the crime of murder; that at the June term of said court, 1873, he was convicted of the crime of manslaughter and sentenced to the Territorial prison for the period of six years; that a bill of exceptions was taken and signed upon the rulings upon the

indictment and the trial; that no notice of appeal was ever given, as required by law; that, subsequent to the trial, after the term had expired, and within the time by which an appeal might have been perfected, the appellant, by counsel, applied to the judge who held said court, at chambers, to amend and correct said bill of exceptions; that he refused so to do at chambers; and that, at the next term of said court, after the expiration of six months from the time of said trial, said court did correct and amend said bill of exceptions as requested.

Upon this state of facts, we are asked to take jurisdiction and hear this case as upon an appeal, which has been duly perfected.

Appeals in criminal actions may be taken by filing a notice of an intention to appeal within six months from the rendition of the judgment, and filing a transcript in this court within thirty days thereafter. Cod. Sts. 249, §§ 396, 397. A compliance with this statute alone gives this court jurisdiction. The appellant has not complied with this statute, and his application must be denied.

If the appellant had given his notice of appeal and filed his transcript as provided by law, and afterward corrected the record in the court below *nunc pro tunc*, we might have heard the case upon the appeal as in other cases.

UNITED STATES, appellant, v. McELROY, respondent.

APPEALS IN UNITED STATES COURTS. The appellate jurisdiction of the courts of the United States is regulated by the acts of congress.

SAME — *laws of Territory*. The Civil Practice Act, which prescribes the mode of appealing to this court, is not applicable to cases arising under the constitution and laws of the United States.

Appeal from Second District, Deer Lodge County.

CLAGETT & DIXON and SHARP & NAPTON, for the motion to dismiss the appeal.

M. C. PAGE, United States Attorney, contra.

SERVIS, J. At the April term, 1873, of the second judicial district court, sitting to try and determine causes arising under the constitution and laws of the United States, the respondent was indicted for the crime of embezzling money, the property of the United States. At the following September term of said court, the court, upon motion, quashed said indictment. From this ruling the district attorney gave notice of an appeal to this court, and procured and filed in this court, as such appeal, a transcript of the proceedings in the court below.

The respondent files his motion to dismiss this appeal upon the following grounds:

1. That no appeal lies upon the part of the United States.
2. That the transcript was not filed within thirty days after the appeal was taken.

The question presented by this motion is one of practice — as to whether the practice in the United States courts or the Territorial practice shall prevail. The mode of removing causes from an inferior court to a superior court within this Territory, is provided in the ninth section of the Organic Act. After providing for the jurisdiction and removal of causes arising under the Territorial laws, it is further enacted: "And each of the said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the district and circuit courts of the United States: * * * and writs of error and appeal in all such cases shall be made to the supreme court of said Territory the same as in other cases."

If a fair and reasonable construction of this section of the Organic Act did not of itself determine the question, we need but look to a few general principles to correctly solve it.

Appellate jurisdiction in national courts is exercised by writs of error or appeal, the former to review judgments at law, the latter to review a decree in equity. It is acquired from the sovereign power of the United States. Exclusive jurisdiction is the attendant upon exclusive legislation, and it is by virtue of such legislation that the case at bar had its inception, and that, too, by sovereign legislation, which carries with it, in its administration, the general practice of the courts of the United States when ad

ministering the laws of the same. The mode, and the only legal mode, for the removal of causes from an inferior national court to a superior is regulated by acts of congress, and does not depend upon the laws of a State or Territory. *Hudgins v. Kemp*, 18 How. 530; *Kelsey v. Forsyth*, 21 id. 85.

The appeal in this case was perfected (if it could be) September 27, 1873, by filing a notice, as required by the Territorial laws. The transcript in this case was filed January 7, 1874, more than thirty days intervening. Under the Territorial practice a motion to dismiss the appeal might be well taken. But we are of the opinion that the Territorial practice does not prevail in cases arising under the constitution and laws of the United States, and that the case at bar is not before this court as required by law.

The motion to dismiss the appeal is, therefore, granted.

Appeal dismissed.

WADE, C. J., concurred.

KNOWLES, J., dissenting. I dissent from the opinion of the court, upon the point that the appeal was not properly taken. I hold that appeals should be taken in United States causes the same as in Territorial causes.

UNITED STATES, respondent, v. SACRAMENTO, appellant.

CRIMINAL LAW — *right of accused to be confronted with witnesses.* A party, who has been indicted for the commission of a misdemeanor, waives his constitutional right "to be confronted with the witnesses against him," by admitting that witnesses, if present, would testify to certain facts stated in the affidavit of the district attorney for a continuance, and thereby preventing a postponement of the trial.

EVIDENCE — *admission of affidavit for a continuance.* Upon the trial of the appellant under an indictment charging him with selling, unlawfully, spirituous liquor to an Indian in the Indian country, the affidavit of the district attorney, in support of his motion for a continuance, set forth that he could not proceed to a trial without the testimony of absent witnesses who would testify that they saw the appellant so sell said liquor. The appellant, in open court, then offered to admit that the witnesses, if present,

would testify to the facts stated in the affidavit, and the motion was denied. *Held*, that the affidavit was admissible as evidence against the appellant upon the trial.

Appeal from Third District, Lewis and Clarke County.

THE action was tried before WADE, J.

SHOBER & LOWRY, for appellant.

M. C. PAGE, United States Attorney, for respondent.

SERVIS, J. At the November term of the district court, A. D. 1874, sitting as a court for the trial of causes arising under the constitution and laws of the United States, the appellant was indicted for a violation of an act of the congress of the United States, passed March 15, 1864, amending an act regulating trade and intercourse with the Indians, passed June 30, 1834, whereby it is provided that, if any person shall sell, exchange, give, barter or dispose of any spirituous liquors or wine to any Indian, under the charge of any Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquors or wine into the Indian country, such person, on conviction thereof, etc., shall be imprisoned, etc. 13 U. S. Stats. 29.

The indictment charges, in substance, that, on the 22d day of September, 1874, the appellant did unlawfully dispose of one gill of spirituous liquors, to wit, whisky, to one John Doe, an Indian, whose real name was unknown to the grand jury; said Indian being then under the charge of the Indian agent for the Black-feet and other neighboring tribes of Indians within the Territory of Montana.

To this indictment the appellant, upon being arraigned, pleaded not guilty, and demanded an immediate trial. The United States attorney then moved the court, upon affidavit, for a continuance of the trial until the next succeeding term of the court. The affidavit set forth: That one Strangle Wolf and one Mary Kite were material witnesses for the prosecution, and without their testimony he could not safely proceed to trial; that he expected to prove by said witnesses all the facts charged in the indictment;

that said witnesses were present and saw the appellant dispose of said spirituous liquors to said John Doe, as alleged in said indictment; and averred his inability to procure said witnesses at said term, assigning a good cause therefor.

The defendants' attorney, in open court, then offered to admit that the witnesses named in said affidavit would, if present in court, testify to the facts set forth in said affidavit, whereupon the court refused to continue the case, and a jury was duly impaneled to try the cause.

Upon the trial the prosecution offered to read in evidence, to the jury, the said affidavit for a continuance, to which the appellant, by his counsel, objected. The objection was overruled by the court, and said affidavit was read to the jury, and appellant then excepted. This is all the evidence which is set out in the record. The appellant was convicted and sentenced to the penitentiary.

After the judgment and sentence by the court, the appellant, by his counsel, moved the court for a new trial, assigning as the grounds therefor the ruling of the court in permitting the introduction, to the jury, of said affidavit for a continuance. The court overruled the motion, and the appellant excepted. Upon this record and state of facts, the appellant asks this court to reverse said judgment and sentence. The introduction of said affidavit to the jury is the error which is assigned.

This raises the question, whether a defendant, indicted for a misdemeanor, which is the case at bar, can waive the right guaranteed by the sixth article of the amendment to the constitution, which provides that a defendant, in all criminal prosecutions, shall enjoy the right "to be confronted with the witnesses against him." Upon an examination of the authorities we have no doubt that such waiver can be made. In the early days of the common law, when a person indicted for crime was not allowed to appear and be defended by counsel, and where the court alone was his legal adviser, it would seem that he could waive no legal right. But this has long since ceased to be the law in England, and was never recognized as the law in this country; certainly not since the adoption of the amendment to the constitution, above cited. 1 Bishop's Crim. Proc. 428, and cases there cited.

The counsel for the appellant insists that his admission, relative to the affidavit for a continuance, extended only to the belief of the affiant that the absent witnesses would testify as therein set forth. This seems to be more of a technical than a real or legal objection. The admission was that the witnesses named in the affidavit, if present, would testify to the facts as stated in the affidavit, which, if uncontroverted, would have warranted a conviction. This must have been the admission according to the understanding of the court and counsel, or the court would have entertained the motion and continued the case. Therefore the admission was a waiver, by the appellant, of his constitutional right to be confronted by the witnesses against him.

Judgment affirmed.

CHUMASERO v. POTTS.

MANDAMUS ISSUED BY COMMON-LAW COURTS. The power to issue the writ of mandate is a branch of the common law, and any court, on which common-law jurisdiction has been conferred, is authorized to issue the writ.

JURISDICTION OF COURTS REGULATED BY LEGISLATURE. The ninth section of the Organic Act, approved May 26, 1864, confers upon the legislative assembly the power to define the jurisdiction of the courts of the Territory, subject to the limitations specified therein.

JURISDICTION IN MANDAMUS. The grant of common-law jurisdiction, by said Organic Act, upon the supreme court carries with it jurisdiction in mandamus, which cannot be taken away by the legislative assembly.

JURISDICTION OF COURTS. Said Organic Act confers upon the district and supreme courts appellate and original jurisdiction.

JURY IN COMMON-LAW COURTS. Courts which have common-law jurisdiction can impanel a jury and receive a verdict, in the absence of a statute providing for the same.

PETITIONERS FOR MANDAMUS. Any citizen of the Territory may be the relator in an application for a writ of mandate, when the subject-matter relates to the validity of an election.

DUTY OF TERRITORIAL CANVASSERS. Under the laws of the Territory, the governor, secretary and marshal of Montana must act together in canvassing the votes upon "An act to change the seat of government of the Territory of Montana," "known as the Capital Law," approved February 11, 1874

NO DEMAND FOR PERFORMANCE OF PUBLIC DUTY. The writ of mandate can be issued against Federal officers, that have failed to perform a duty of a public nature, imposed upon them by the legislative assembly, when no demand for the performance thereof has been made.

MANDAMUS ISSUED TO THE GOVERNOR. This court can compel the governor of the Territory, by its writ of mandate, to perform the ministerial act of canvassing the vote upon said Capital Law.

DUTIES OF FEDERAL OFFICERS. The legislative assembly can require the Federal officers of the Territory to perform duties, which are not enumerated in said Organic Act.

PLEADING ABOUT LEGAL REMEDY. The application for a writ of mandate need not allege that the petitioner has no plain, speedy and adequate remedy at law.

JURISDICTION OF MANDAMUS. The legislative assembly of the Territory has conferred rightfully upon the supreme court, original jurisdiction to issue the writ of mandate.

ELECTOR WHO IS "BENEFICIALLY INTERESTED." An elector of the Territory is "beneficially interested" in legal proceedings to compel its officers to perform their duties, and is the proper party to apply for the writ of mandate to secure this result.

REMEDY OF MANDAMUS. Mandamus affords the only remedy to the citizen who seeks to compel an officer to perform his duty to the public.

CERTIFICATE OF CANVASSERS. The certificate of the Territorial canvassing board, upon the vote for the approval of the Capital Law, is *prima facie* evidence of the legal vote cast at the general election; and the members of the board have no right to go behind the abstracts of the votes returned to it.

JURY TRIAL IN MANDAMUS. Under the Civil Practice Act, a party to the proceedings in mandamus does not have the absolute right to a trial of the facts by a jury, and courts can exercise their discretion respecting the mode of trial.

NATURE OF MANDAMUS PROCEEDINGS. A proceeding in mandamus is not a case at common law, or a civil action under the Civil Practice Act.

ACT OF CONGRESS RELATING TO TRIAL BY JURY CONSTRUED—*mandamus proceedings.* The act of congress, entitled "An act concerning the practice in Territorial courts, and appeals therefrom," approved April 7, 1874 (18 U. S. Sts. 27), contains this clause: "*Provided*, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." *Held*, that the term, "cases cognizable at common law," does not include proceedings in mandamus.

CASE DOUBTED. The case of *People v. Pacheco*, 29 Cal. 210, holding that a proceeding in mandamus must be prosecuted in the name of the real party in interest, and that it could not be prosecuted in the name of the State, doubted.

GRANTING A TRIAL BY JURY. The discretion of courts in awarding or refusing a jury in proceedings in mandamus will be governed by the manner in which material issues have been presented; the condition of the public

mind in the district in which the court is held; the interests at stake; the difficulty in procuring jurors from a disinterested section; and the delay resulting from the trial of the issues in another court.

Four applications for the writ of mandate were heard and determined at this term, which related to the seat of government of Montana, and contained substantially the same allegations. The pleadings in the first proceeding, that of *Chumasero et al. v. Potts et al.*, are stated in the opinion of WADE, C. J. The other applications were filed in open court, and comprised those of *Lawrence v. Hickman*, *Sanders v. Star* and *Shober v. Callaway*. Hickman, the Territorial treasurer; Star, the Territorial auditor; and Callaway, the secretary and acting governor of the Territory, had their offices in Virginia city. The relators alleged that Helena was the capital of the Territory, and the chief object of these proceedings was to compel these officials to remove their offices, books and archives from Virginia city to Helena. Star answered and the other parties filed demurrers, and legal questions of a similar character were discussed by counsel in the proceedings. The demurrers were overruled, and answers were filed and the parties applied for a jury to try the issues of fact. This application was denied for the reasons which appear in the opinion of KNOWLES, J., *post*, 258.

An appeal was taken to the supreme court of the United States and dismissed in February, 1876, for want of jurisdiction. 92 S. C. 358.

W. F. SANDERS, CHUMASERO & CHADWICK and JOHNSTON & TOOLE, for relators.

S. WORD, J. G. SPRATT, H. F. WILLIAMS and C. W. TURNER, for Callaway and Hickman; H. N. BLAKE, for Potts and Star

No briefs on file.

WADE, C. J. This is an application by William Chumasero and John A. Johnston for a peremptory writ of mandate, to issue from this court against B. F. Potts, governor, J. E. Callaway, secretary, and W. F. Wheeler, marshal, of Montana Territory, to compel the performance by them of certain acts.

The petition sets forth, among other things, that the petitioners are electors of said Territory; that they reside at the town of Helena, in the county of Lewis and Clarke, and are there engaged in the practice of law; that in the course of such practice it is necessary for them to make frequent journeys to the capital of said Territory, in attendance upon the supreme court thereof, in which court they practice as attorneys and counselors at law, and which court is required to be held at the seat of government of said Territory twice in each year; that such journeys to the capital of said Territory, situate at Virginia city, are attended with great expense and inconvenience, and that as such electors and attorneys and counselors at law, they are beneficially interested in the removal of the seat of government of said Territory from the city of Virginia, in Madison county, to the town of Helena, in the county of Lewis and Clarke.

The petitioners further state, that by virtue of an act of the legislative assembly, passed upon the 11th day of February, 1874, the seat of government of said Territory was removed from Virginia city to the town of Helena, but subject to the approval thereof of a majority of the legal votes cast on that question at the first general election after the passage of such act; that upon the first Monday of August, 1874, in pursuance of said act, and the act of congress of May 26, 1864, the question of so removing the seat of government was regularly and legally submitted to the qualified electors of said Territory in the several counties thereof, and that said electors upon that day, throughout the Territory, voted upon the question of the approval or disapproval of said act of the legislative assembly according to the terms and provisions of such act.

The petitioners then state the vote of each county in the Territory upon the approval or disapproval of said act, as ascertained and counted by the county commissioners in each of said counties, in pursuance of the statutes in such case made and provided, the vote of Meagher county being by such count 561 votes for the approval of the act, and 29 votes for the disapproval thereof, and that the aggregate of such vote was for the approval of said act, 4278, and for the disapproval thereof, 3821 votes; that, by virtue of said vote and such election, the seat of government was re-

moved from said Virginia city to the town of Helena ; that the votes so cast in each of said counties were duly returned to the offices of the county clerk of the board of county commissioners for each of said counties, and that such votes were regularly opened, and an abstract thereof made, which abstracts yet remain in the offices of said county clerks ; that, within thirty days after such election, it became the duty of the secretary and marshal, in the presence of the governor, to meet, and if a certified copy of the abstract of the votes of each of said counties had not been received, it became the duty of the secretary then and there to send a messenger for an abstract of such absent vote, and that, when all of the abstracts of the votes from the several counties had been received, it became the duty of the secretary and marshal, in the presence of the governor, to canvass and count said votes ; that the secretary and marshal did on the 2d day of September, 1874, meet in the presence of the governor to canvass said vote, but that when they so met they did not have before them a certified copy of the vote of Meagher county, or the county of Gallatin, upon the approval or disapproval of such act ; that the secretary failed and neglected to send for the abstract of the votes of said counties ; that said canvassers made a canvass of the votes of all the other counties of said Territory except the vote of the counties of Meagher and Gallatin ; that said canvassers had before them at said canvass, a paper which was not a certified copy of the abstract of the vote of Meagher county, and which did not have affixed thereto the seal of said county, or the signature of the clerk of the board of county commissioners, but which was false and forged, wherein the votes of Meagher county upon the approval or disapproval of said act were falsely represented to be 561 votes for the disapproval thereof and 29 votes for the approval thereof, when in fact the true vote as given at said election, and as shown by the abstract thereof made by the county commissioners, was 561 votes in approval of said act, and 29 votes in disapproval thereof, which said false and forged paper was accepted by said canvassers as the true abstract of the vote of said Meagher county, and was counted by them in said canvass, by means of which, the approval of the said Capital Law as herein set forth was not declared by said secretary and marshal, but that the said sec-

retary did falsely and fraudulently declare as the result of said pretended canvass upon the approval or disapproval of said act, that there had been cast a majority of 152 votes for the disapproval of said act.

The petitioners further state, that the secretary and marshal have been requested, and it has been demanded of them that they make a canvass of all the votes cast at said election, including the votes of the counties of Meagher and Gallatin, but that they have refused and still do refuse so to do.

The petitioners further state, that they have no adequate remedy at law, and therefore ask of this court a peremptory writ of mandate to issue against the secretary, marshal and governor, to compel a canvass of all the votes of the Territory upon the question of the approval or disapproval of said act removing the seat of government of the Territory to the town of Helena.

To this petition the governor appears by demurrer, and says, in substance :

First. That this court has no jurisdiction to issue a writ of mandamus ; in other words, that this court has no original jurisdiction.

Second. That the petitioners have not the right or capacity to bring this action or to ask for such writ.

Third. That no demand was made upon him prior to the application for the writ.

Fourth. That the court has no right or authority to in any manner control the action of the executive by mandamus.

Fifth. That the act of the legislative assembly, requiring of the governor, secretary and marshal the service of canvassing the vote of the Territory at a general election, is a requirement of said officials unknown to the Organic Act, and a violation of the provision thereof, which prohibits any Federal official from holding a Territorial office, and, therefore, that the act imposing the duty of canvassing such vote is void.

The secretary also appears by motion, and objects to the issuance of the writ for substantially the same reasons as those assigned in the demurrer of the governor.

It will be apparent to the most casual observation, that the questions raised by this demurrer and motion are of the very

highest concern, and that the fate of this case, as it may affect the city of Virginia, or that of Helena, sinks into utter insignificance, when placed beside the great principles involved. We have, therefore, given the questions presented the grave and patient consideration their importance demands at our hands.

First. As to the jurisdiction of the court. It is contended, upon behalf of the respondents, that in the early days of this court, soon after its organization, and while the records and the forms of practice and procedure were in a state of chaotic uncertainty and disorderly confusion, there were two cases decided by the justices thereof, which decisions denied to the court jurisdiction in mandamus, and that these decisions are precedents and authority which should conclusively control the action of the court in the case at bar. What was determined by these cases, or how they arose, depends very much upon the recollection and memory of the pioneers of the Montana bar, as the record of the cases, if the mutilated document produced here may be called a record, does not give much light upon the subject, and the recollection of the attorneys is contradictory and uncertain. The cases were tried some time in 1865, and before the decisions of the court were preserved in an authoritative form, but enough does appear from the antiquated and mutilated document, and from the recollection of those who helped to try, or were present at the trial of the cases, that an application to this court was made for a writ of mandate to obtain possession of certain offices, which application was denied, evidently for the reason that *quo warranto* was the proper remedy to accomplish such a purpose, so that, if this record was in such condition that it could be in any sense regarded as an authority in the present case, it would not be an authority either for or against the jurisdiction of this court to issue a writ of mandamus, when that remedy was applied for in a case in which the writ is applicable.

We are compelled then to determine the question of jurisdiction, as a new question, never having been decided in this Territory.

The office of the writ of mandate is to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station, and is issued by a court having jurisdic-

tion to any inferior tribunal, board or person. It is a writ of an exalted character, and is often denominated the prerogative writ, or the writ of right, because it is interposed to prevent disorder from a failure of justice, where the law has established no specific remedy, and where in justice and good government there ought to be one. The power to issue the writ in a proper case is a branch of the common law, and, whenever common-law jurisdiction is conferred upon a court without restriction or limitation, such court necessarily has authority to issue the writ. Considering, then, the objects and purposes of the writ, and its nature and character, we naturally look to the highest courts in the land for the right to issue and use it. But courts in this country depend for their existence and their jurisdiction upon the law that creates and clothes them with power and authority, and, in looking for the jurisdiction of the supreme court, we must go back to the fountain and source of authority, to the Organic Act, which called the Territory into being, and which is at once our charter and constitution.

Section 9 of this act provides: "That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and in justices of the peace. The supreme court shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and who shall hold a term at the seat of government of said Territory annually. * * The said Territory shall be divided into three judicial districts, and a district court shall be held in each of said districts by one of the justices of the supreme court, at such times and places as may be prescribed by law. * * The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law; *provided*, that justices of the peace shall not have jurisdiction of any matter in controversy when the title of land may be in dispute, or where the debt or sum claimed shall exceed \$100; and the said supreme and district courts, respectively, *shall possess* chancery as well as *common-law jurisdiction*. * * *

Writs of error, bills of exceptions, and appeals shall be allowed in all cases from the final decisions of said district courts to the su

preme court, under such regulations as may be prescribed by law."

By this section of the Organic Act the jurisdiction of the supreme and district courts are defined; and first, this jurisdiction may be such as the legislature sees proper to confer, but this general grant of jurisdiction is limited and controlled by the other words of the section, "that said courts shall possess chancery as well as common-law jurisdiction." And, although the supreme and district courts are granted such jurisdiction as the law shall define and declare, yet the grant is so restricted that by no law or legislation can the chancery and common-law jurisdiction be taken from such courts. The words of the section in relation to jurisdiction, when read as they modify and restrict each other, are as follows: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law," but "said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction."

It is contended, however, by virtue of this section, that the supreme court therein organized and established is exclusively a court of appellate jurisdiction, and that it has no original jurisdiction whatever.

How is this proposition maintained? Simply and solely from the fact that appeals are allowed from the district courts to the supreme court, as if the grant of appellate jurisdiction necessarily excluded the possession of original jurisdiction. This section provides that the supreme court and the district courts, respectively, shall possess chancery as well as common-law jurisdiction, and that this jurisdiction shall be as limited by law. That is to say, these courts shall exercise such chancery and common-law jurisdiction as the legislature of the Territory, by legislative enactment, shall provide they may, and no more, subject to the restriction that such courts shall always have chancery and common-law jurisdiction, and this jurisdiction cannot be taken away by the legislature. Authority is given directly and explicitly to the legislature to determine this jurisdiction, subject to the limitation that justices of the peace shall not meddle with the title to land, and shall not try cases wherein the amount in controversy exceeds \$100, and that

appeals may be taken from the district courts to the supreme court, and subject to the restriction that the supreme and district courts shall always possess chancery and common-law jurisdiction. The legislature has supreme control over the jurisdiction of the several courts created by the Organic Act. Within these boundaries it may grant or withhold jurisdiction at its sovereign will and pleasure. The supreme court has appellate jurisdiction by virtue of this section, and also common-law jurisdiction, and neither can be taken away by the legislature.

Jurisdiction in mandamus is a great branch of the common law, and therefore jurisdiction in mandamus is inherent in the supreme court, and whether this jurisdiction shall be exercised as original or appellate jurisdiction must depend upon the statutes of the Territory, and this jurisdiction cannot even be taken away by the legislature. The grant of common-law jurisdiction carries with it jurisdiction in mandamus, and no power except congress can take away this jurisdiction.

How does the district court become possessed of original jurisdiction? By precisely the same means as does the supreme court, and neither of said courts can have any such jurisdiction but for the words of the Organic Act, which confers chancery and common-law jurisdiction upon both. Jurisdiction in the district court, as that of the supreme court, shall be as limited by law, subject to the restrictions of the Organic Act, and therefore it is that if jurisdiction in mandamus is denied the supreme court, it must fail in the district court, for both receive their authority from the same source, and from the same grant of jurisdiction.

The district courts may be appellate courts as well as courts of original jurisdiction. Whether they are or not depends upon the legislature. Ever since the Territory was organized, and ever since the system of Territorial government, under organic acts precisely similar to our own, was established, appeals have been going on from the probate court and justices' courts, by virtue of legislative enactments; and did any one ever doubt the validity of the statutes providing for such appeals? But these statutes were all wrong, they were all void, if the construction of the 9th section of the Organic Act contended for prevails; and why? **Because** it is claimed that the supreme court is exclusively an ap-

pellate court, and that the district courts are exclusively courts of original jurisdiction, and hence their exercise of appellate jurisdiction is a nullity. The words of the Organic Act do not compel any such forced construction. Their fair and natural meaning is, that both the supreme and district courts are clothed with appellate and original jurisdiction.

This construction of the Organic Act is not unsupported by authority. In the case of *Kendall v. United States*, 12 Pet. 524, the supreme court of the United States gives a construction to words similar in meaning and import to the grant of jurisdiction in our Organic Act. In the District of Columbia there was a court called the circuit court, and it was given jurisdiction by congress in the words following: "That the said court shall have cognizance of all cases, in law and equity, between parties, both or either of which shall be resident, or be found within the district," and, under this grant of jurisdiction, the court held that this circuit court had authority to issue the writ of mandamus.

But the authority of the case of *Hornbuckle v. Toombs* seems fully and conclusively to sustain the views herein expressed. In that case, the court say (18 Wall. 655): "Whenever congress has proceeded to organize a government for any of the Territories, it has merely instituted a general system of courts therefor, and has committed to the Territorial assembly full power, subject to a few specified, or implied conditions, of supplying all details of legislation necessary to put the system into operation, *even to the defining of the jurisdiction of the several courts*. As a general thing, subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of congress to revise, alter and revoke at its discretion. The powers thus exercised by the Territorial legislatures are nearly as extensive as those exercised by any State legislature; and the jurisdiction of the Territorial courts is collectively co-extensive with and correspondent to that of the State courts, a very different jurisdiction from that exercised by the circuit and district courts of the United States. *In fine, the Ter-*

ritorial, like the State courts, are invested with plenary municipal jurisdiction."

This is the language of the supreme court of the United States in a decision rendered during the last year, in a case taken from this Territory to that court, and as long as that decision remains in force we must conclude that the Territorial legislature may define the jurisdiction of the several Territorial courts, subject to a few specified or implied conditions, among which, it is not unreasonable to say, is the condition that justices of the peace shall not have jurisdiction in cases where the title to land comes in question, or the amount in dispute is more than \$100; that appeals may be taken from the district courts to the supreme court; that both supreme and district courts shall possess chancery as well as common-law jurisdiction, and that such jurisdiction shall not be destroyed by any act of the legislature. And, with this enunciation of the powers of our Territorial legislature, under our Organic Act, we must hold that a statute of our legislature, conferring jurisdiction upon all the courts of the Territory, except probate and justices' courts, in mandamus, does confer jurisdiction, in such cases, upon the supreme court, and that such act of the legislature is not in contravention of the Organic Act.

The supreme court of the Territory of Colorado, organized and deriving its jurisdiction from and by virtue of an organic act, in substance and effect precisely like our own, in an adjudicated case hold that the supreme court of Colorado has original jurisdiction in mandamus. This case is directly in point upon the question now being considered, and is the only decision which any Territorial supreme court has rendered involving the question of original jurisdiction in mandamus in such courts, and, having been rendered by a court organized and deriving its authority, like our own, from an organic act of similar import, it must be regarded as authority. *People v. Hallett*, 1 Col. 352.

It is said that our statute provides that the issue of fact in mandamus may be tried by a jury, and that, as there is no law authorizing this court to call a jury, therefore it can have no jurisdiction. But can it possibly be claimed that a court having common-law jurisdiction cannot call a jury in a proper case? The right to a jury, and the mode and manner of calling it and of submit-

ting issues to it for trial, form a part and parcel of the common law, and any court having common-law jurisdiction can always impanel a jury in a proper case for a jury, and cause a verdict to be rendered. But even if this was not the case, the statute in relation to mandamus provides that an issue of fact may be sent to a jury for trial, and that for this purpose the case may be sent to any county in the Territory, and this provision looks as if the legislature supposed that this court might be called upon to exercise its jurisdiction in mandamus, and thereby provided the means for submitting an issue to a jury in a proper case.

2. It is claimed that these relators have not the right or the capacity to demand the relief sought, upon the ground that they are mere private citizens, and show no definite, specific title or interest in the relief demanded.

The statute provides that the party seeking the relief shall be beneficially interested therein; and are these relators so interested in the relief demanded as that they have the right to bring this action? This distinction is made in the authorities, and must be kept in view here, that where a party seeks a mere private right or private relief he must show a specific title or right to the relief demanded, but where the relief is a public matter, or a matter of public right, the people at large are the real party, and any one of the citizens can bring the action.

In the case of *The People v. Collins*, 19 Wend. 56, the court say that, in matter of public right, any citizen of the State may be relator in an application for a mandamus to enforce the execution of the common law or an act of the legislature. And this was said in a State where the law provided an attorney-general to prosecute for the people, and in their name, and was put upon the ground that the attorney-general might fail in doing his duty, and for this reason left the right with any individual citizen. The reason of this doctrine applies with much stronger force in a State or Territory, as in that of our own, where the legislature has failed to provide an officer to prosecute for the people at large, for, in our Territory, if the individual citizen had not the right, then it would be lost altogether.

Also, Moses, on Mandamus, says, page 198: "And when the subject-matter has relation to the validity of an election, it seems

that it is a matter of such public right that any citizen may be a relator in an application for a mandamus." This view of the subject is fully sustained by the following authorities: *State v. Marston*, 6 Kansas, 532; *State v. Bailey*, 7 Iowa, 390; *Crowell v. Lambert*, 10 Minn. 369; and the authorities cited in opposition mostly relate to mere private rights and private relief, and do not contradict the position here taken. It follows then that the relators have the right to bring this action.

3. It is contended that the petition shows that no demand was made upon the respondents before bringing this action. There is an allegation of demand upon the secretary and marshal for a canvass of the vote of the Territory, and the averment is such as would authorize proof of demand to be given in evidence, and demand having been made upon two of the canvassers, we are called upon to inquire in what capacity the secretary, marshal and governor act in making a canvass of the vote. Each one of the canvassers have specific duties to perform, and neither can act without the presence of the other. The secretary and marshal count the vote, and the governor declares the result, but no step can be taken, no count can be had, except the three canvassers be present. The act of either would be utterly void without the presence of the other. Hence we say that the secretary, marshal and governor, by the statute imposing upon them the duty of making a canvass of the vote, act as commissioners for that purpose. They are a canvassing board, and demand upon one would be a demand upon all.

But as to the necessity of demand in any case, here again a distinction is made between duties of a public nature and those of a mere private character, which affect private individuals only. In the case of a public duty, and strictly of a public nature, and not affecting individual interests, and where no one is especially empowered to demand its performance, there is no necessity for a demand and refusal. Where the duty is required to be performed by the law and is of a public nature, the law is a sufficient demand, and an omission to perform is a refusal. The following authorities support this view of the subject: *High on Ex. Rem.*, §§ 13 and 41; *Moses on Mandamus*, 125; *State v. Bailey*, 7 Iowa, 390; *Commonwealth v. Commissioners*, 37

Penn. St. 237. And observing the distinction between duties of a public and private nature, the seeming conflict in the authorities is, to a great extent, harmonized.

4. That the court cannot control the action of the executive by mandamus.

Upon this subject we say, that the executive may be compelled to perform an act clearly ministerial in its nature, and neither involves any discretion nor leaves any alternative. And the following authorities control our judgments upon this question: Moses on Mandamus, 82, 83, 84, and authorities there cited; High on Ex. Rem., §§ 118, 119, and notes and authorities cited *State v. Chase*, 5 Ohio St. 529; *Kendall v. United States*, 12 Pet. 524; *Marbury v. Madison*, 1 Cranch, 170. And we hold that the acts of the commissioners in canvassing the vote were purely of a ministerial character, like that of adding a column of figures or of the issuing of a commission to an officer duly elected to an office. In *Marbury v. Madison*, Chief Justice MARSHALL says: "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."

And so in the present case, the propriety of the writ is not to be determined by the fact that it is demanded against the executive, but by the nature of the act required of the executive to perform. And looking into the nature of the act, we say it is purely ministerial, and is absolutely defined by the law, and hence that the action of the executive in this regard may be controlled by mandamus.

5. That the act of the legislative assembly requiring of the governor, the secretary and the marshal, the duty of canvassing the vote of the Territory at general elections, is in contravention of the Organic Act, and therefore void; that is to say, because the legislature has imposed duties upon certain United States officials, unknown to the Organic Act, therefore, such action of the legislature is void. We must remember that in the case of *Hornbuckle v. Toombs*, the supreme court say, that congress has chalked out a general scheme of local government for the Territories, by their Organic Acts, and has intrusted the legislature with the entire system of municipal law,

and the legislature having such trust may impose what duties it sees proper upon any Federal official here, not inconsistent with their official duties, and such imposition of duties is not the creation of a Territorial office. Hence, when the legislature imposes duties upon the Federal judges, as it has done and can again, or upon the executive, as it did in the act in relation to the Territorial prison, or upon the secretary, as it did in relation to issuing the commission to notaries public, there was not, by the imposition of these duties, the creation of a new office, but simply the creation of an additional duty for an old officer. But if the act did create a new office for the governor, secretary and marshal, they are *de facto* officers, and cannot, in mandamus, deny that they are officers, as they have entered upon the performance of their duties, and *quo warranto* is the proper remedy to try the title to an office in such a case.

There are certain duties required of the governor, secretary and marshal by the Organic Act, the same as there are certain duties assigned to and required of the president by the constitution; but since the adoption of the constitution a thousand duties unknown to the letter of that instrument have been imposed upon the president by acts of congress, and whoever dreamed that by the enactment of these statutes, or by the imposition of these duties, new offices were created, and that the chief executive was not only president but a thousand other officers by virtue of these acts of congress? Besides this, congress has over and over again recognized the validity of this act of the legislature, requiring the governor, secretary and marshal to canvass the vote of the Territory at general elections, by admitting delegates to congress who obtain their seats by virtue of the election and canvass by said canvassing commissioners; and to pronounce against the validity of such law would shake to the foundation our whole system of laws.

It is insisted that the action should be dismissed as to the governor. But the governor is a member of a commission or board whose duty it is to canvass the vote. A proper case is made in the petition for such canvass by this canvassing commission, and if the marshal and governor are ready and willing to make the canvass, no hardship will be endured by requiring them, as

members of a commission which cannot act at all without their presence and their help, to do what they are willing to do without any requirement. But the order to canvass, if made at all, must be made to the commission or board, and we cannot conceive how we can require one member thereof to make a canvass without also making the same requirement of the board or commission jointly, which order must apply to each and all the members thereof.

It is said that the petition does not sufficiently state that the relators have no speedy and adequate remedy at law. This statement is mere matter of form, for the court must determine from what the petition states whether or not there is a plain, speedy and adequate remedy at law. Such an averment would be of no moment whatever, if the petition did not state sufficient facts, and if sufficient facts are stated the averment may be dispensed with.

The motion and demurrer are therefore overruled.

Peremptory writ issued.

KNOWLES, J. I have had, and now have grave doubts as to whether or not the petition states facts sufficient to warrant the court in issuing a writ of mandamus against the governor, but have concluded to concur with the chief justice upon this point as well as the others as expressing the better view.

KNOWLES, J. After the answer of the secretary and governor was filed to the petition of the above-named applicants, a demand was made by the attorneys for the resistants for a jury in this case. This brings to the consideration of this court the question as to whether or not the parties to a proceeding in mandamus have an absolute right of trial by jury, when an issue of fact is joined. A portion of section 523 of our Practice Act is as follows:

“If an answer is made which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, and, upon the supposed truth of the allegation on which the application for the writ is based, the court may, in its *discretion*, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court.”

This is a portion of the chapter on the writ of mandate, and refers exclusively to that subject. The right to trial by jury in mandamus proceedings, then, is not absolute under our statutes.

An act of congress, entitled "An act concerning the practice in Territorial courts, and appeals therefrom," approved April 7, 1874, contains this clause: "*Provided*, that no party has been or shall be deprived of the right of trial by jury, in cases cognizable at common law." This is a proviso in a section of said act, which provides that the several codes of procedure in the Territories shall be valid.

The question here presented for consideration is, whether or not the proceedings in mandamus is a case at common law.

If the term "common law," as used in our national constitution in the seventh amendment thereto, had not, in the case of *Parsons v. Bedford*, 3 Pet. 433, received an interpretation by which we are bound, we might be called upon to examine this term fully. The term "common law" in that case, the United States supreme court held, was a term used in contra-distinction to chancery or equity, and signified a case at law merely. It is probable that court would follow that rule in interpreting the statute under discussion, although the same reasons that induced that court in that case to find that the framers of the seventh amendment to the national constitution, when they used the term "common law" meant simply law, do not so fully appear in the interpreting of this clause. The ruling in that case was based upon the fact that when that amendment was framed all actions in the several States were at common law or in equity, and that its framers had direct reference to that condition of affairs.

Many of the States have abolished the distinction between law and equity as to proceedings. In this Territory such is the case. In fact, the distinction never existed with us. In the case of *Hornbuckle v. Toombs*, 18 Wall. 648, the United States supreme court held that our legislative authority had full control over the mode of procedure in our courts. This proviso, then, could not have been framed with reference to the same state of facts that existed at the time of the establishment of the seventh amendment to the constitution.

The term "cases in law," as used in article 3, section 2, of the

United States constitution, has been defined to be a suit or action at law. *Osborn v. U. S. Bank*, 9 Wheat. 738; Story on Const., § 1646. The term "case at common law," as used in this statute under consideration, was not intended to be used in any broader sense, I am confident. It certainly could not have been the intention of congress to use it in so broad a sense as to include every judicial proceeding at law, whether the same should fall under the head of a civil action, or should be denominated a special or extraordinary proceeding. The term "case at common law" I shall consider as implying only an action or suit at law. When we refer to the decisions of the supreme court of the United States to determine whether or not a mandamus is a suit or an action at law, we find ourselves involved in considerable perplexity. In the case of *Kendall v. United States*, 12 Pet. 524, Mr. Justice THOMPSON, in delivering the opinion of the court, says: "That the proceeding on a *mandamus* is a case within the meaning of the act of congress has been too often recognized in this court to require any particular notice. It is an action or suit brought in a court of justice, asserting a right, and is prosecuted according to the forms of judicial proceedings." The statute referred to in this, was one that gave the circuit court of the District of Columbia jurisdiction of all cases at law and in equity.

TANEY, Chief Justice, BARBOUR, Justice, and CATRON, Justice, dissented from a majority of the court in this case. Chief Justice TANEY, in his dissenting opinion, says: "Since the statute of the 9th of Anne, authorizing pleadings in proceedings by *mandamus*, it has been held that such a proceeding is in the nature of an action, and that a writ of error will lie upon the judgment of the court awarding a peremptory *mandamus*. But it never has been said, in any book of authority, that this prerogative process is 'an action,' or 'a suit,' or 'a case' at law." I have been unable to find any authority contrary to this assertion of this distinguished judge up to this decision above referred to.

Justice CATRON, in his dissenting opinion, says: "In no just sense can this writ of *mandamus* be deemed a case at law between the United States and the postmaster-general. It differs, in no material feature, from a writ of attachment issued by a court against one of its officers, where he refuses to perform an

official duty." The case of *Kendall v. Stokes*, 3 How. (U. S.) 100, decided by the same court, maintains the same view of proceedings in *mandamus* as in the above case.

In the case of *The Commonwealth v. Dennison*, 24 How. (U. S.) 97, Chief Justice TANEY, in the opinion of the court, says: "It is equally well settled, that a *mandamus* in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ." In support of this he cites the above-named cases of *Kendall v. United States*, and *Kendall v. Stokes*.

In the case of *Riggs v. Johnson County*, 6 Wall. 166, the same court, however, holds this language: "Tested by all these considerations our conclusion is, that the propositions of the defendants cannot be sustained, and that the circuit courts in the several States may issue the writ of *mandamus* in a proper case, where it is necessary to the exercise of their respective jurisdictions, agreeably to the principles and usages of law. Where such an exigency arises they may issue it, but when so employed, it is neither a prerogative writ nor a new suit, in the jurisdictional sense. On the contrary, it is a proceeding ancillary to the judgment which gives the jurisdiction, and when issued becomes a substitute for the ordinary process of execution to enforce the payment of the same, as provided in the contract." How can such decisions be reconciled? The only manner in which they may be reconciled is, that the courts of the United States treat the writ of *mandamus*, as to the mode of proceeding thereon, and as to the nature of the *writ itself*, the same as it is treated by the laws and decisions of the State where the same is applied for. This last decision is based upon this view. See the opinion of the court in that case, 6 Wall. 189-194.

The cases of *Kendall v. United States* and *Kendall v. Stokes* arose under the laws of the District of Columbia, in the part ceded by Maryland. At that date they were the same as the laws of Maryland at the date of cession to the general government. The statute of 9th Anne, ch. 20, had, at this date, been either recognized by the decisions of the courts or adopted by statute in most of the States of the Union. High. on Ex. Rem., § 448, p. 319; § 496, p. 357. From what can be inferred from the

decisions in the cases of *Kendall v. United States* and *Kendall v. Stokes*, and from what authorities I possess, although not explicit upon the point, I have no doubt but that the statute of 9th Anne, ch. 20, was in force in Maryland at that date.

By that statute the party applying for or prosecuting a writ of mandamus might plead to or traverse the facts contained in the return to the alternative writ, to which traverse the person making such return might reply, take issue or demur. And the statute goes on to provide: "And such further proceedings, and in such manner shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return. And if any issue shall be joined in such proceedings the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried." 9 Anne, ch. 20, § 2.

This statute evidently incorporates an action on the case upon what was before the proceedings for a writ of mandamus.

The common-law authorities after this say that the proceedings in mandamus were assimilated to or were in the nature of an action. 3 Black. Com. 264; Bac. Abr., title Mandamus.

The proceedings after the return to the alternative writ have certainly all the indicia of an action at law. The decisions of the United States supreme court, in the cases of *Kendall v. Stokes*, *Kendall v. United States* and *Commonwealth v. Dennison*, should all, in my judgment, be considered with reference to the statute of 9th Anne. This last case was instituted on an application made directly to the United States supreme court. "The practice in the United States courts, in cases of mandamus, prior to the act of congress of June 1, 1872, was substantially identical with the practice at common law." High's Extraordinary Legal Remedies, 373, § 528.

In his opinion, in the last of the above-named cases, in support of his ruling that in modern practice the proceedings in mandamus were nothing more than "an action at law between the parties." TANEX, C. J., as before said, cites the above cases of *Kendall v. United States* and *Kendall v. Stokes*. The inference I draw from this is that the court in this case of *Kentucky v. Dennison*,

adopted the practice that prevailed in the District of Columbia in proceedings in mandamus, and hence adopted the common-law proceedings in such cases as modified by the statute of 9th Anne.

Courts, in referring to this statute of 9th Anne, treat it generally as a part of the common law. I cannot bring myself to the conclusion that so distinguished and able a tribunal as the supreme court of the United States could have held that the proceedings in mandamus, without being modified as by the 9th of Anne, were nothing more than an action at law between the parties. Before that statute the proceedings were altogether summary. The relator made an application, supported by a suggestion, under oath to the king's bench, setting forth facts which showed that some one of the king's officers was not performing his duty, or that some person had unlawfully intruded himself into an office, and if the court deemed the facts sufficient, an alternative writ was issued in the king's name. Neither the application or the suggestion were entitled. If the respondent made a return traversing the alternative writ fully, there was an end of the proceeding. The truth or falsity of the return could not be tried and determined in that proceeding. The applicant had a right to proceed against the respondent in an action on the case in a separate proceeding for a false return, if he had suffered any damage on account of such return. If the respondent did not fully traverse the alternative writ the peremptory writ issued. Tapping's Mandamus, 5; High's Extraordinary Legal Rem. 325, § 457; 3 Blackstone's Com. 110-111. It is true that there appears to have been a practice, at common law, at times of issuing a rule *nisi* to the respondent, on the filing of the suggestion requiring him to show cause, if any, why the alternative writ should not issue. This rule did not issue in all cases, however. Tapping's Mandamus, 5-6; 3 Blackstone's Com. 111. But even when the rule *nisi* was issued there could not be said to be a case at law, for neither the application, or affidavit or suggestion were entitled. And they were not entitled for the very reason that there was said to be no case as yet. High's Extraordinary Leg. Rem., § 509; Moses on Mandamus, 251, and cases cited there. After an alternative writ was issued, commanding the respondent to do the acts specified, or show cause, how could mandamus be called a

case or action at law between the parties. For, as we have seen, if the return fully traversed the writ, its truth or falsity could not be tried in that proceeding.

The writ was issued in the name of the king. If the return was not sufficient in law there could be no demurrer interposed to it. There seems to have been invented, for the determination of the legal sufficiency of the return, what was termed a *concilium*, if the defect was not apparent on its face. But if it was, then its legal sufficiency was determined by motion. Again, all the common-law writers upon the subject of mandamus, in speaking of the effect of the statute of 9th Anne upon the proceedings in mandamus, say after this statute mandamus became assimilated to, or assumed the nature of an action. Tapping's *Mandamus* (marginal page), 7; High's *Extra. Leg. Rem.*, § 458; 3 Blackstone's *Com.* 265; *Bac. Abr.*, title *Mandamus*. From this it is evident that these writers did not consider the proceedings in mandamus an action at law before this statute. Although we have adopted the common law of England, so far as applicable, yet the statute of 9th Anne, upon this subject, is not in force with us. We have adopted a statute at variance with and which takes the place of and supersedes it.

If I am correct in the foregoing views the decisions in the cases of *Kendall v. The United States*, *Kendall v. Stokes* and *Kentucky v. Dennison* are not authority with us under our statute. And under the authority of *Riggs v. Johnson County*, we must consider proceedings in mandamus as we find them under our Territorial laws. Is it an action at law under our statute? Mandamus, with us, is but a modification of the common-law proceedings before the statute of 9th Anne upon this subject. Much of it is only declaratory of the common law as it was before that statute. At common law the writ was issued to any inferior tribunal, corporation, board or person to compel the performance of any duty specially enjoined by law as a duty resulting from an office, trust or station, or to compel the admission of a person to the possession of an office from which he had been unlawfully excluded by such tribunal, corporation, board or person. This is section 518 of our Practice Act.

The writ issued at common law is the same as under our statute where there was not a plain, speedy and adequate remedy in the

ordinary course of law on the application of a party beneficially interested. At common law the application was supported by a suggestion under oath. The application, under our statute, is supported by affidavit. At common law the term "motion" is used instead of application, but an application is no more than a motion. In section 523 of our Practice Act it is called a motion. Section 521 of our Practice Act shows that the alternative writ may be granted without notice as at common law. The same section also shows that the application may be heard on notice. This is nothing more than the rule *nisi* at common law to show cause. Under our Practice Act the proceedings are simplified, and the alternative writ is dispensed with when the application is granted on notice. Section 522 provides that there may be, at the proper time, an answer, under oath, made the same as to a complaint in a *civil action* to the affidavit, if notice be served, or to the alternative writ. This answer is nothing more than the cause shown under the rule *nisi*, or the return to the alternative writ at common law. Section 523 provides for a trial by jury when an issue of fact is raised by the answer. As before said, this trial by jury, under our statute, is discretionary with the court. It will be observed that the whole issue is not to be presented to the jury as in an ordinary action at law. If the court decides to submit the question of fact at issue to a jury, he must make an order in which shall be distinctly stated the question to be tried, and the place of trial. This is at variance with the common-law proceedings. Before the statute of 9th Anne there was no trial by jury of an issue of fact when such occurred upon cause shown. After that statute, as the proceedings after issue joined upon a question of fact were to be conducted as an action on the *case*, a jury was awarded. Taking this section 524, and sections 525 and 528 together, and it appears that the manner of presenting the issue to a jury in mandamus proceedings under our statute is more nearly allied to an issue framed in a chancery case and sent to a court of law to be tried than to those of law. During the time of this trial of the issue of fact, which may be tried in any county in the Territory, the proceedings are all the time pending in the court in which they were instituted, and the finding of any fact by the jury, in the court in which the question was ordered tried, must

be certified back to this court. And in a case where the answer is made, under notice, to the affidavit, no case is, in reality, pending all this time of the trial of this issue. The application is not entitled; the affidavit is not entitled, and the answer, under such circumstances, of course should not be entitled. And this we hold is the proper practice under our statute. Mandamus is governed by the rules of the common law when these have not been abrogated. High's Extra. Leg. Rem., § 8. These rules of practice have not been abrogated under our statute. At common law, in regard to entitling the proceedings, they were as set forth above. *Chance v. Temple*, 1 Iowa, 179; *Haight v. Turner*, 2 Johns. 371; *People v. Tioga*, 1 Wend. 291; *People v. Dikeman*, 7 How. Pr. 124; High's Extra. Leg. Rem. 509; *Moses on Mandamus*, 251; *State v. Johnson County*, 10 Iowa, 157.

The reason given for not entitling the application and affidavits, as will appear by the above authorities, is because no case is yet pending. The object of all the proceedings in mandamus before the writ issues is to enlighten the discretion of the court in determining whether or not to issue the writ. The granting of the writ of mandamus rests in the wise, legal discretion of the court. High's Ex. Leg. Rem. 9, 11 and 12, and cases cited; *Moses on Mandamus*, 18, and cases cited. And this last is true, whether or not issue be joined upon the affidavit or alternative writ. In this proceeding the application was not entitled, the affidavit was not entitled, the notice of the application was not entitled, and the answer should not have been if it is. To call this an action or suit at law would be certainly a misnomer; and it is not certainly a case at law unless that term signifies more than action or suit at law, and was used by congress in so broad a sense as to embrace proceedings for the writ of *certiorari*, the writ of *habeas corpus* and proceedings for *contempt*. Certainly congress could not have intended to use it in so extensive a sense. The statutes of our Territory, upon the subject of mandamus, show conclusively that our Territorial legislative power did not suppose it was providing for an action at law. Section 522 of our Practice Act provides, that the party "may show cause by answer under oath made in the same manner as an answer to a complaint in a *civil action*." Section 529 of said act provides: "The writ shall be served in the

same manner as a summons in a *civil action*, except when otherwise expressly directed by order of the court."

The manner in which the term *civil action* is used in these two sections shows conclusively that our legislative assembly did not consider that the proceedings in mandamus were a civil action. What is a civil action? The first section of our Practice Act is as follows: "There shall be in this Territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs." It will be seen that the civil action here referred to has reference exclusively to private rights and private wrongs. And it may here be observed that it was the intention of our legislative assembly to provide for all of what are usually denominated actions at law and suits in equity. It is believed that all civil actions at law or suits in equity as used before our Code, had for their objects only the enforcement or protection of *private* rights and the redress or prevention of *private* wrongs. Of course a government might resort to one of these actions in a proper case, but when this was done it was treated as a person and the right it sought to enforce was in its nature a private right. It was one of that class of rights that in its nature may pertain as well to a private person as to a government. What is the nature of the proceedings called mandamus? "It is not applicable as a redress for mere private wrongs." Tapping's Mandamus, 59. "It is not, however, applicable as a private remedy." Id. 64. "It can be resorted to only in those cases where the matter in dispute, in theory, concerns the public, and in which the public has an interest. The degree of its importance to the public is not, however, scrupulously weighed." Moses on Mandamus, 18.

"In the specific relief which it affords, a mandamus operates much in the nature of a bill in chancery for a specific performance, the principal difference being that the latter remedy is resorted to for the redress of purely private wrongs or the enforcement of contract rights, while the former generally has for its object the performance of obligations arising out of official station, or specially imposed by law upon the respondent. The object of mandamus is to prevent disorder from a failure of justice and a defect of police, and it should be granted in all cases where the

law has established no specific remedy, and where, in justice, there should be one. And the value of the matter in issue, or the degree of its importance *to the public*, should not be too scrupulously weighed.” High’s Ex. Leg. Rem., § 1.

From the above authorities it appears that mandamus is not a remedy for the enforcement of private rights or the prevention or redress of private wrongs, but a remedy for the enforcement of public duties enjoined by law, and which, in theory at least, the public have a right to demand to be performed, and an interest in the same. The enforcement of the writ may incidentally, and as a result, affect private rights, but this is not the prime object of the issuance of the writ. We refer, in confirmation of this view, to the fact that the general practice is for the writ to issue in the name of the government or sovereign, on the relation of some party. In correct practice, as we have seen, the proceedings never are entitled, as for example, *John Doe v. Richard Roe*.

In all treatises upon pleadings pertaining to common-law actions there will not be found one word upon the subject of mandamus. It is not treated of by one of them as a civil action at law. Burrill, in his Law Dictionary, in defining the term “action,” says: “It is further to be observed that there are many judicial proceedings conducted merely in the same form as actions before the same tribunals, and with the same general objects, viz., the enforcement of some legal right or remedy which, nevertheless, are not technically considered as actions, nor so denominated. Of this description are the proceedings at law by *writ of error*, *scire facias*, *mandamus*, *certiorari*, *habeas corpus*, and the like.”

The attempt to classify the proceedings in mandamus is always futile. It is *sui generis*. Undoubtedly it may be called an extraordinary legal remedy, civil in its nature. Some courts have held that mandamus was a prosecution but not a criminal action, but a proceeding of a special and independent character. *Chance v. Temple*, 1 Iowa, 179.

The king’s bench, in England, had, originally, exclusive jurisdiction over the writ of mandamus. Originally this court had no jurisdiction over any actions or remedies that did not savor of

a criminal nature. 3 Blackstone's Com. (marginal page) 42. It is evident Blackstone did not consider mandamus a common-law action. See Blackstone's Com., book 3, ch. 17. Upon considering these authorities we have a solution of what the legislative power of this Territory meant in sections 522 and 529 of our Practice Act, by the term "civil action." It referred to the action provided in the first section of our Civil Practice Act for the enforcement or protection of private rights and the redress or prevention of private wrongs. This, in most Codes of Civil Practice similar to ours, is called a civil action. Mandamus, being a remedy to enforce a public right and not for the enforcement or protection of private rights or the prevention or redress of private wrongs, is not a civil action. It is, undoubtedly, a civil remedy, but the terms "remedy" and "action" are not synonymous. The term "civil action," under our Practice, is, as we have seen, co-extensive with the common-law actions and suits in equity. Cases at law signifying nothing more than actions at law. Mandamus is not a case at law, then, under our Practice, and hence not within the clause of the law of congress under consideration, which guarantees a trial by jury in all cases cognizable at common law. We have been referred to but one authority which holds that the right of trial by jury is not absolute in cases in mandamus. *Atherton v. Sherwood*, 15 Minn. 221. No cases were cited holding a contrary view.

The case of *The People v. Pacheco*, 29 Cal. 210, was cited to show that there it was held to be nothing more than a civil action. It did decide that the clause of our Practice Act which provides that every action shall be prosecuted in the name of the real party in interest applied to *mandamus*, and that the proceeding instituted which exhibited a clear case for mandamus could not be prosecuted in the name of the State. As much as I am inclined to follow the rulings of that distinguished court upon the subject of practice, I totally disagree with its rulings in this particular in that case. That provision of our Practice refers to civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs, and hence does not apply to mandamus.

Our statute upon mandamus, which is the same as that of California, provides that the party beneficially interested may apply for this writ; and the authorities are almost universal that when the writ issues it is issued in the name of the government, and is entitled as a case by the government against the respondent, and is a command on the part of the government. Tapping's Mandamus, 59; Moses on Mandamus, 194; High's Ex. Leg. Rem., § 1; *Chance v. Temple*, 1 Iowa, 179.

Whether or not this writ shall be considered a prerogative writ makes very little difference in practice. It is a necessary and proper remedy over which certain courts are given cognizance by our laws; and the general authority given our legislative power to establish a full code of municipal laws, for this being called a Territorial government, includes the power to provide for this writ as a necessary and proper portion of our judicial system.

Much might be said in relation to the issues presented in this proceeding. There are a large number of issues tendered in the answers that go to the point that there was a fraudulent and illegal vote cast upon the subject of the approval of the capital law.

This is a question that the canvassers of the return of the abstracts of the votes had nothing to do with. It was no part of their duty to determine what was the true and legal vote cast. What they were required to do was to determine what the abstracts of the vote returned to them showed upon this subject. As they have no right to go behind these abstracts they have no right to assign as a reason for not canvassing the true abstracts, that there was an illegal and fraudulent vote behind them.

If such an issue was allowed to be raised when the question was whether an election officer should canvass or not election returns, every single one of them, down to the judges of election, might raise the same issue, and there would be a clog upon our whole political system. Officers, whose duty by law is to canvass returns, have no other legal duties than these to perform, and as it would not be within the province of the proceedings in mandamus to compel them to go behind the returns and determine the actual legal vote cast, so they cannot set up what in law does not concern them, as officers, as a defense when they are required

to do what does concern them, as officers, under the provisions of law.

Again, many of the issues presented in the answers were set forth on information and belief. The answer to the affidavit or alternative writ provided for must conform to the same rules as would an answer to a complaint in a civil action. Civil Practice Act, § 522. In the case of *Sands v. Maclay*, ante, 35, this court held that, under the provisions of our statutes, an answer to a complaint upon information and belief would not be proper. The late amendments to the Civil Practice Act have not changed it so as to vary this ruling. It was doubtful whether a single issue was presented in this case in proper form, save the one that put in issue the fact as to whether there was any such town as Helena.

It is not necessary, however, to consider this question further, only to observe that the unsatisfactory manner in which an issue is presented should guide a court in exercising its discretion in such a proceeding as this, in awarding or refusing a jury. It is only when a material issue is raised by an answer that in this proceeding a court has the discretion to order an issue submitted to a jury. Civil Practice Act, §§ 521, 523 and 527.

It may be further observed that the character of the issue to be presented, and the condition of the public mind in the region where the court is held, and the peculiar interests at stake, and the inclemency of the weather that would prevent the court from procuring a jury from a distance in a less excited and interested region, and the delay that would be occasioned by sending the issue to another court to be tried, are all matters which a court may take into consideration in deciding upon a question of discretion.

When a court feels that the highest and best interests of a government will be protected and fostered by assuming all of the legal responsibilities of its judicial position, it is its duty to accept the situation no matter what considerations of personal prudence might dictate to the members of that body a different course. Considering all of the matters that should guide the legal discretion of this court in this proceeding, the majority of its members refuse the application for a jury.

As this opinion will be filed subsequent to the trial of the issues presented, I feel that it is my privilege to add to this opinion the following: The only material question that was presented to the court to determine was as to whether or not the abstract of the vote of Meagher county, which the marshal, secretary and governor had canvassed at their first session as a canvassing board upon this subject, was a forged one or not. Upon a consideration of the evidence before it, the court did not hesitate a minute in deciding that that abstract was a forgery. This was the unanimous opinion of the court. The only question upon which there was a unanimous opinion of the court upon any one material issue presented in all of these proceedings upon this subject; and I cannot refrain from observing that this, I think, fully vindicates the action of the court in its determination to refuse a jury.

KNOWLES, J. In the application of Chumasero and Johnston for a writ of mandate against the governor, secretary and marshal of this Territory, the question of the original jurisdiction of this court to entertain an application for a writ of mandate was considered, and it was there held by it that this court had such jurisdiction. I deem it necessary to add but a few words to that decision. On this point, section 9 of our Organic Act, after providing for the several courts of the Territory, uses this language: "The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law." This is a grant of power to the legislative authority over this subject of jurisdiction. The language used is not as definite and perspicuous as could be desired; and, perhaps, no verbal criticism can be made upon it, considering the rest of the section, that would be free from objections. In this Territory, and, in fact, in all of the Territories having similar Organic Acts, the question of what was the true construction of this grant of power has created considerable anxiety and trouble, and instigated considerable investigation and thought.

The general construction the legislative departments of the several Territories have put upon this grant has been similar to that

decided upon by the supreme court of the United States in the case of *Hornbuckle v. Toombs*, 18 Wall. 648; and it is a maxim in the construction of statutes "that contemporaneous exposition is very strong."

No better impression can be conveyed of what the United States supreme court decided in that case, than will arise from an inspection of the exact language used by it. It is as follows:

"Whenever congress has proceeded to organize a government for any of the Territories, it has merely instituted a general system of courts therefor, and has committed to the Territorial assembly full power, subject to a few specified or implied conditions, of supplying all details of legislation necessary to put the system into operation, even to the *defining of the jurisdiction* of the several courts."

Again: "From a review of the entire past legislation of congress on the subject under consideration, our conclusion is, that the practice, pleadings, and forms and modes of proceeding of the Territorial courts, as well as *their respective jurisdictions*, subject, as before said, to a few express or implied conditions in the Organic Act itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves."

Whatever may be said about the point of the power of the legislative authority over the jurisdiction of the several Territorial courts, here decided, being *obiter dicta*, certain it is that the opinion does cover the point at issue, and holds, that subject to a few express or implied conditions, which will be considered hereafter, the legislative authority of the Territory may, under the grant before specified, fix and determine the jurisdiction of the several Territorial courts; and certain it is that the opinion was called forth in a case where the extent of the power conferred upon the legislative authority by this grant was under consideration. And it is further evident that the supreme court of the United States, in this case, intended to fully review this most vexed question in regard to the legislative powers of the Territories over the jurisdiction of Territorial courts, and to settle it permanently, and to place their decision upon a solid and enduring foundation. The Territories ought to be willing to be bound by that decision. It

puts a liberal construction upon the grants of power to them, and gives them a standing that has frequently been denied them, even by that court, heretofore, and it is certainly good authority for Territorial courts to follow. Whether or not it is *obiter dicta* upon this point, it is the deliberate opinion of the highest judicial body in the United States, composed of able and experienced jurists. The next point I will consider is, what are the few express and implied conditions upon the legislative authority in exercising this grant of power? It is not difficult to determine what the express conditions are. They are contained in the proviso in section 9 of our Organic Act, and section 2 of the amendment thereto. A mere inspection will disclose them. But nowhere in the Organic Act is there an express provision that the supreme court shall not have any original jurisdiction. If there is any condition of that kind it must be an implied one. From the use of the terms "district courts" and "supreme courts," I do not see how any such condition can be implied. For if from these terms the jurisdiction is implied, then it is just as much implied that the district courts shall be courts of original jurisdiction as it is that the supreme court should have only appellate jurisdiction; and it is just as much implied that the district courts should be courts of exclusively original jurisdiction, as it is that the supreme court should have only appellate jurisdiction. Yet, under the interpretation which the several legislative departments of the Territories have given to this grant above referred to, appeals have been allowed from justices of the peace and the probate courts to the district courts, under laws they have enacted in pursuance thereto. It is true that now, under an amendment to our Organic Act, appeals from the probate to the district courts are provided for. But, long before this amendment, appeals from the probate to the district court were allowed under Territorial laws, and appeals to-day from justices of the peace to the district courts are authorized only by virtue of such laws. If the terms "district courts" and "supreme court" fix the jurisdiction of these courts, why was it necessary to insert the clause in our Organic Act, "The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law."

And why was it necessary to provide that the supreme and district courts shall possess chancery as well as common-law jurisdiction? And why was it thought best to enact that "writs of error, bills of exceptions, and appeals, shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law." If the term "supreme court" fixes the status of that court as exclusively an appellate court, then, in the same section, we see the jurisdiction thereof fixed by the term used next, a grant of power to the legislative authority to define it. Thirdly, a limitation on this ground, namely, that it shall possess chancery and common-law jurisdiction. And lastly, we find it made an appellate court from the final decisions of all cases in the district court; a jurisdiction that, it is claimed, the very term gives it. The truth is, that to hold that the term "supreme court" fixes its jurisdiction, would make of section 9 an absurdity. The point that the Organic Act makes provision for writs of error, bills of exception, and appeals from the final decisions of the district courts to the supreme court, cannot raise the implication that the supreme court is only an appellate court; for if the conferring of one jurisdiction in the Organic Act precludes the conferring of any other, then the grant of jurisdiction that the "district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the district and circuit courts of the United States," would preclude the district courts from exercising any other jurisdiction than this. If it is said that the jurisdiction here conferred on the district court is a particular one, then I answer, so is this appellate jurisdiction of the supreme court. It is confined to writs of error, and bills of exceptions and appeals from the FINAL DECISIONS OF THE DISTRICT COURT. Again, if this clause confers upon the supreme court all the jurisdiction it is entitled to, namely, appellate jurisdiction of the final decisions of the district courts, then, so far as this court is concerned, what force and effect is the grant that the jurisdiction of this court, as well as the others, shall be limited by law; and what was the use of granting it chancery and common-law jurisdiction? If it be said that the clause, "as limited by law," gave the legislative power the authority to pro-

vide the mode of taking writs of error, bills of exception and appeals to the supreme court from district courts. What was the necessity of this other clause in relation to this very subject, "Under such regulations as may be prescribed by law." If it be said that the legislative authority may make the supreme court an appellate court for the final decisions of the probate courts and of justices of the peace, I answer, certainly. But from whence this power? From the authority given in the general grant that the jurisdiction of the several courts shall be such as is limited by law. This grant, by itself, certainly gives as much power over the original jurisdiction of this court as over its appellate jurisdiction. There is no distinction in it. What are the implied conditions referred to by the United States supreme court? I am not fully prepared to say, but I can find, nowhere in the Organic Act itself, or out of it, any implication that the supreme court should not have any original jurisdiction. I am inclined to think, however, that the supreme court might have referred to something like this: In the 13th section of our Organic Act, there is this clause, "that the constitution and all the laws of the United States which are not locally inapplicable, shall have the same force and effect, within the said Montana Territory, as elsewhere within the United States."

This clause, by implication, would prevent our legislative authority conferring jurisdiction, in bankruptcy cases, upon the courts of the Territory, or of cases in admiralty, or cases affecting ambassadors, other public ministers, etc. Many other cases might be enumerated. I suppose, under the general restrictions upon the general government, which are restrictions upon Territories also, the legislative authority of a Territory could not abolish the right of trial by jury in the cases specified in the United States constitution. Neither could it provide for holding a person to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury. These are implied restrictions upon the legislative department of the Territory in prescribing the mode of judicial proceedings and practice. Many other similar restrictions might be specified.

I only state these as giving my views in part as to what implied conditions I suppose the United States supreme court referred to.

In this, however, I may be mistaken. That court has not stated what implied conditions it referred to. Whatever they may be I can find none that the supreme court of the Territory cannot have any but appellate jurisdiction. There is no language of the Organic Act that I can twist into conveying any such implication. As to the point that under the construction here given the legislative power might provide for appeals from the supreme court to justices of the peace, perhaps in cases involving not more than \$100, or where the title to land did not come into controversy. But I have this to say here: I have not much respect for an argument that is based upon the idea that it was the intention of congress to so tie up the legislative authority of the Territory as to preclude any possibility of it enacting foolish or ill-advised laws. I suppose that congress, if those who advance such arguments do not so consider, thought that the legislative department of the Territories would possess average intelligence and would honestly desire to do what was for the best for the people it was called upon to act for, and would have a more intimate knowledge of their necessities than congress. The creating of Territorial governments presupposed some ability on the part of the people of the Territories for self-government.

The legislative power of this Territory has undoubtedly conferred upon the supreme court original jurisdiction to issue the writ of mandate, and having found that it had the authority to do this, that terminates the inquiry upon this point.

In the matter of the application of Chumasero *et al.*, before specified, it was also determined that an elector of this Territory had such an interest in having the laws of this Territory properly complied with by its officers, that he might be properly denominated a party beneficially interested therein, and hence was a proper party to make the application for the writ of mandate to compel an officer to perform a legal duty due the whole people of the Territory.

The considerations that impelled this court in that application to this conclusion still appeal to me with overpowering force. Republican governments may be properly denominated civil associations, indissoluble except by universal consent, formed by the members thereof, for certain purposes, which they consider bene-

ficial to themselves. Among the objects of such a civil association are generally, "the establishment of justice, mutual protection, the promotion of the general welfare, the preservation of good order, and the protection of each individual member in his rights to life, liberty and property."

Our Territorial government, I take it, was created for the benefit of the people within its limits, and they are as much interested in preserving it as though it was their creature. The laws of a Territory are as much compacts between the citizens thereof as the constitution and laws of a republic are compacts between the members thereof. Office-holders, with us the same as in a republic, are but the agents of the people. Our laws are but compacts which the citizens have entered into through agents, namely, the legislative assembly. They are their acts. Each member of an association, whether the same be civil or private, is directly interested in having the agents of the same perform their legal duties, and which the agent, by assuming his official position, agreed to perform. Often, for the violation of official duties enjoined by law, the mode of procedure for redress is specifically pointed out by law, and this must be followed. The violation of a criminal statute is the breaking of a compact which the offender has entered into with every citizen, and each citizen is interested in seeing the criminal law or compact upon the subject of crimes enforced, but this can only be done in the mode provided by law. If the offense be a felony a grand jury must indict, and the public prosecutor, in the name of the government or people, prosecute.

If the offense be only a misdemeanor a citizen may institute an action in the name of government, or people, upon making the proper complaint. This is the rule in this Territory. In this proceeding the petition or affidavit of the applicant shows that a duty has been enjoined, by law, upon R. O. Hickman, as Territorial treasurer, which he has failed and refuses to perform. No mode, save by the writ of mandate, is provided, by our laws, to compel the performance of this duty. It is not made the duty, by law, of any person or officer to institute this proceeding for this purpose. If an elector cannot make such an application as this, then there is no redress. The law, at such a juncture, must remain unenforced, a dead letter, and our government, in this re-

spect, a failure, because there is no other provision of law authorizing another agent to institute the proceeding to compel this agent to do his legal duty. With such a holding there would be a practical illustration of the old adage, "what is everybody's business is nobody's business," and there would be an end of the matter. Under such a ruling there would be no means, under our law, of compelling a single officer in the Territory to perform any legal duty which he owed to the public at large. I do not deem it necessary that I should discuss the proposition, that an officer would not possess the power to institute such proceedings, unless specially empowered to do so by law. The authority of a public officer is circumscribed by law. A district attorney cannot act as a county commissioner, or a county commissioner as district attorney. An application for a writ of mandate must be made by a person beneficially interested in the performance of the official duty required. Is the applicant, as an elector, beneficially interested in having Hickman perform the duty specified? He is as much interested as he would be in having any other officer perform any other legal duty due the people generally. As much interested as he would be in having a public prosecutor prosecute a criminal who had committed a revolting crime. If an elector of this Territory, which was organized for his benefit, whose laws are compacts to which he is a party, who may be called upon to put his life at stake in the enforcement of the laws of the Territory, and the preservation of the Territorial government itself, being subject to be called out as one of a posse comitatus, and to military duty, and under the power of taxation, all of his property subject to be exhausted for the same government, whose officers are his agents, and to which he has trusted his life, liberty, and the tenure of his property, and the well-being of his family, is not beneficially interested in seeing the laws of this Territory enforced, and its officers perform their legal duties, it is difficult to determine in what he is beneficially interested.

In what manner are the people at large beneficially interested in a public officer performing his legal duties that would differ from that of any one citizen? If a public officer was empowered to institute these proceedings, how could he show, more satisfactorily to this court, that the people at large were beneficially in-

terested in an officer performing his legal duty than one citizen can? It may be remarked, also, that laws do not generally bear upon persons so much in their collective capacity as in their individual capacity. Most laws are made to protect the rights of individuals, and not the government. Hence the right to have laws enforced, and officers perform their legal duties, should pertain as much if not more to a private person than to the civil being called government. When a nuisance affects a great many people, yet affects them as individuals and not as members of a firm or association, each may maintain his action for the wrong done him. And when a legal duty is required of a public officer which is more for the benefit and for the convenience of citizens individually than for the government, it is difficult to see why a citizen is not a proper party to institute proceedings for the performance of this duty, although a great majority of the citizens of the Territory may be as much interested in having this duty performed as he. The very object of creating the writ of mandamus was more to protect public rights of individuals than private ones.

“The object of a mandamus is to prevent disorder from a failure of justice and a defect of police, and it should be granted in all cases where the law has established no specific remedy, and where, in justice, there should be one. And the value of the matter in issue, or the degree of its importance to the public, should not be too scrupulously weighed.” High’s Extra. Legal Rem. 4.

“It is founded on Magna Charta (chap. 29), and was introduced to amplate justice by the prevention of disorders arising from either a failure or defect of police.” Tapping on Mandamus, 58.

“As it was a remedy introduced to prevent disorder from a failure of justice, in pursuance of the principles of the common law, it ought now to be used upon all occasions where the law has established no specific remedy, and where in justice and in good government there ought to be one.” Moses on Mandamus, 17.

To hold that a private citizen had not a beneficial interest sufficient to institute the proceeding of mandamus, where the matter complained of was one of public concern, would, in our Territory, as I have shown, prevent this important writ being used for one

of the chief objects for which it was created, namely, to prevent disorders arising from a defect of police, and would show that the legislative power of this Territory had provided a remedy for this purpose, and yet given no one the power to institute it. It is more reasonable to suppose that the legislative power of the Territory intended that the phrase beneficial interest should be so broad in its significance as to embrace the interest which every citizen has in having every public officer perform his legal duties. This I hold to be its proper construction.

In many States the courts have held that each citizen was so interested in having officers perform their legal duties, that he could institute the proceeding of mandamus to compel the performance of this duty. These authorities were cited in the opinion in the application of Chumaseero and Johnson, above referred to. There are other authorities that apparently conflict with these. This court, in that case, however, thought that perhaps if the statutes of the States where these decisions were rendered were before us, it might be found that there was as distinct and positive a mode provided by law for proceeding in such class of cases as this as has been provided in our laws for proceedings in criminal cases, and that in such States, of course, this mode provided must be followed, and that it would appear, from these statutes, that a citizen was not a proper person to institute proceedings in mandamus where it was a matter that affected the people generally. If it should turn out, however, that the statutes of those States were similar to our own, then we stand in opposition to such rulings.

The fact that other allegations than the ones that the applicant was a citizen and elector of the Territory are made in the petition, which show only the propriety of the applicants applying for the writ, will not lessen the force of these important allegations. It is a well-known rule, in all pleadings, that if a party alleges more facts than are necessary these will not vitiate what is properly pleaded.

In the case above referred to, decided by this court, it was held, that, when the duty enjoined by law and required of an officer was due to the public generally, and not to a person, individually and exclusively, it was not necessary that any specific demand

should be made upon the officer to perform this duty, and hence no statement of demand was necessary in the affidavit of the applicant. There would seem to be some conflict of the authorities upon this point, but to me there are the best reasons for supporting the views held by this court in that case. The object of a demand upon an officer, generally, is to show him what his duties are in a given case. But in this case the law points out specifically the officer's duty, and he must take notice of the law, and he must know that it is his legal duty to perform it, and he must know further, that it is his legal duty to perform this act without any demand upon him. There can then be no reason in requiring a demand to be made of him before this proceeding would lie. It would apprise him of no new duty. The fifth objection is, that in the petition two distinct causes of action have been improperly united. If this is the case it was not pointed out to us in the argument for respondent, and upon an inspection of the petition or affidavit we fail to find such to be the case.

The sixth objection is, that the applicant has a proper remedy in damages for any injuries he may suffer for the failure of the respondent to perform the legal duty required of him. We hold this to be not true.

As well might it be said to a citizen, by a judge who refuses, without legal excuse, to pronounce judgment upon a person duly convicted of crime, if you are damaged by this act of mine bring your suit for damages. The truth is that the rules for assessing damages do not apply in such cases. No citizen can make out a case for damages when a public officer refuses to perform a legal duty due the public generally, yet who will not say that every law-abiding citizen is not interested in seeing this duty properly executed. We have held that he is beneficially interested in this. Yet should a jury be impaneled to assess any damages that might accrue for this failure of duty, it would be found that the damages were too remote and speculative for assessment. Upon this point see *Hugh's Extraordinary Legal Remedies*, § 17; *Freemont v. Crippen*, 10 Cal. 211.

I come now to the most important objection to the application that pertains exclusively to this proceeding, namely, that the affidavit or petition does not state facts sufficient to warrant the

court in awarding the writ. The substance of the applicants' petition, outside of the points already noticed, is this : R. O. Hickman is the Territorial treasurer ; as such it is his legal duty to keep his office at the capital of the Territory ; that he keeps his office at Virginia City, which is not the capital thereof ; that the town of Helena is its capital ; that at the eighth session of the legislative assembly of Montana Territory an act duly passed said assembly removing the capital of this Territory from Virginia City to Helena, and at the first general election thereafter, to wit : the election held on the 3d day of August, 1874, said act was approved by a majority of the legal votes cast thereat upon this question ; that before said election due notice was given to the submission of said act to the legal voters of the Territory for their approval or rejection.

The point presented by the applicant is, that it is immaterial whether or not the governor approved of this act ; that it is immaterial whether or not this vote was ever canvassed by the proper officers. If the act passed the legislative assembly in proper form, and after due notice was approved by a majority of the legal votes cast at the general election on the 3d of August, 1874, in law the capital was removed from Virginia City to Helena. Whether or not these points are well taken depends upon the construction of the 12th section of our Organic Act. It is as follows :

"The legislative assembly of the Territory of Montana shall hold its first session at such time and place in said Territory as the governor thereof shall appoint and direct ; and at said first session or as soon thereafter as they shall deem expedient, the governor and legislative assembly shall proceed to locate and establish the seat of government for said Territory at such place as they may deem eligible, provided that the seat of government fixed by the governor and legislative assembly shall not be at any time changed except by an act of the said assembly duly passed, and which shall be approved, after due notice, at the first general election thereafter, by a majority of the legal votes cast on that question."

The question we are called upon to consider in the construction of this section is : In what manner did congress intend to provide for a change of the seat of government of this Territory, after the same had been fixed by the governor and legislative assembly ?

In arriving at the intention of congress it will be profitable to recur to the terms used in this section :

First, the governor is to fix the place for holding the legislative assembly ; next, the governor and legislative assembly shall establish the seat of government ; and lastly, this may be changed by an *act of the legislative assembly, duly passed and approved, after due notice, by a majority of the legal votes cast at the next general election.* There is certainly a distinction made here between the governor and legislative assembly.

A portion of section 4 of our Organic Act reads thus :

"And be it further enacted, That the legislative power and authority of the said Territory shall be vested in the governor and a legislative assembly. The legislative assembly shall consist of a council and house of representatives."

Here it will be seen that the governor is made a co-ordinate branch of the "legislative department." A portion of this "legislative power and authority" is vested in him. And here, again, we see a distinction between him and the legislative assembly. He is not a member of the legislative assembly.

Again, we find in section 6 this clause: "Every bill which shall have passed the council and house of representatives of the said Territory shall, before it becomes a law, be presented to the governor of the Territory. If he approve, he shall sign it."

Taking all of these provisions of law together and there cannot be any doubt but that the governor cannot be called a member of the legislative assembly, or any portion of the legislative assembly. Can it be said, then, that an act of the legislative assembly, duly passed, is a bill passed by the council and house of representatives, and approved by the governor? What is the meaning of the term "act?" An act is a thing done or performed "The result of public deliberation, or the decision of a prince, legislative body, council, court of justice, or magistrate." Webster.

"A thing done, or business formally transacted by a public body, and always expressed in writing, especially a legislative proceeding." Burrill's Law Dict.

"In the legal sense this word may be used to signify the result of a public deliberation, the decision of a prince, of a legislative

body, of a council, court of justice, or magistrate. Also, a decree, edict, law, judgment, resolve, award, determination." Bouvier's Law Dict.

Generally it may be said that a proposed law is embodied in a bill. When this bill is duly passed by a legislative body it becomes an act of that body; that is a thing done. As all acts or bills are generally required to be signed or approved by the executive department of a government, when the executive department signs or approves of a bill passed by the legislative department, or in other words, an act thereof, it becomes a law. Nowhere have I been able to find any use of the word "act" that would give it any other signification than the usual one, "a thing done." When, therefore, we speak of a thing done by the legislative assembly, we cannot, certainly, mean a thing done by the legislative assembly and the governor, for we have seen that the governor is no part of the legislative assembly. As the governor is invested with a portion of the legislative power and authority conferred upon this Territory, a law thereof is not only an act of the legislative assembly but of the governor also. There has been some point made upon the words "duly passed." This phrase qualifies the word "act," and the word "act" is limited by the clause "legislative assembly." It is not an act, "a thing done," by the legislative assembly and governor that must be "duly passed," but of the "legislative assembly alone." And this word "passed" is usually applied, in legislative proceedings, to the action of a legislative body upon a bill. We say "a bill has passed the house or assembly," not that it has "passed the governor." The proper word for his action is "approved." By recurring again to section 6 of our Organic Act, we will see the distinction here made, and that the term "passed" is used to denote the action of the assembly, and the term "approved" to the action of the governor. And upon a further inspection of section 12 of our Organic Act, it would appear plain that the governor should not participate in an act changing the seat of government of the Territory. The phraseology of the proviso ought to be sufficient: "*Provided*, that the seat of government fixed by the governor and legislative assembly shall not be, at any time, changed except *by an act of the said assembly duly passed*, and which shall be

approved, after due notice, at the first general election thereafter, by a majority of the legal votes cast on that question."

How could the governor and legislative assembly fix the seat of government? Only by a law or resolution which would, in effect, be a law. It would then be fixed, in the first place, by an act of the legislative assembly, which act would be approved by the governor. But in this proviso we see the act is to be one of the legislative assembly which shall be APPROVED by a majority of the legal votes cast on the question. The same language used in relation to the action of the people that is used by the governor when he assents to an act of the legislative assembly. We might place these two assertions by the side of each other: An act of the legislative assembly, approved by the governor, becomes a law. An act of the legislative assembly, approved by a majority of the legal votes cast, becomes a law.

The former is true of every act of the legislative assembly, except upon this question of the removal of the capital. The latter is true on the question of the removal of the seat of government only. The construction I put upon this section is, then, that the seat of government may be changed by an act of the legislative assembly alone, duly passed, which is approved by a majority of the legal votes cast, at the proper time, upon that question, after due notice. If these events have transpired, there is a law changing the seat of government of the Territory. The resistant must take notice of this law. The issue presented in this case upon this subject of a change of the seat of government of the Territory is, then, what was the legal vote cast on this question at the last general election? The certificate of the proper canvassing board, or commission of the Territory, is only *prima facie* evidence of this fact. The certificates of the canvassing boards of the several counties can have no greater force. It is the approval of the people of the act of the legislative assembly upon this subject that makes it a law, not the canvass of the votes cast thereon by a commission or boards. Hence, under the issue here offered, the legal vote upon this subject may be determined.

WADE, C. J. I concur fully in the decision that the objections of the respondent to the petition of the relator be overruled,

and in all matters contained in the opinion, except the portion thereof relating to the question, whether or not, in the passage of an act providing for the removal of the seat of government of the Territory by the legislative assembly, it is necessary, to the validity of such act, that it be approved by the governor. The objections of the respondent do not raise this point, and there is nothing in the petition to bring the question before the court.

The averment of the petition is, that this act providing for the removal of the seat of government was duly passed by the legislative assembly. There is no averment, and no intimation of any kind anywhere, that this act was not approved by the governor, but the presumption is that it was so approved by the use of the averment that it duly passed the assembly. The respondent can deny this and raise an issue thereon, or the petition could have raised the question by proper averments, and until such issue be made by an answer, or the question is presented in the petition itself upon demurrer or motion by the respondent, its discussion, it seems to me, is a mere speculation, and is not, by any rule or reason, legitimately before the court.

No objection, then, being made to the passage of the act, or to its validity as a law, the great question is, whether or not the legal voters at the election approved thereof. And this question upon an answer raising a proper issue can be tried in this proceeding. The abstract of the canvassers is *prima facie* evidence of the vote, but the court can go behind this, and ascertain what the exact vote in fact was. •

Virginia City cannot retain, nor Helena acquire the capital by virtue of a canvass, but its location must depend upon the legal vote of the people under the act of the legislature providing for its removal.

SERVIS, J., dissenting. While I dissent from the opinion of the court as announced by the chief justice, I consider it due to counsel, as well as myself, to attempt to assign some reason therefor; and while I do not dissent from some propositions necessary to be considered in forming the opinion of the court as announced, yet I do dissent from that relating to the authority of this court to exercise original jurisdiction in mandamus, and

the sufficiency of the complaint to entitle the petitioners in any court to the relief they demand, and also to the denial to the respondents of a trial by jury. I discuss these in their order :

First. As to the original jurisdiction of this court.

Questions of judicial jurisdiction are questions of special importance ; and while courts are clothed with unrestricted rigor in the exercise of their judicial powers, yet jurisdiction cannot be invoked except upon subjects, and by those for whom written authority exists, either in the constitution, acts of congress or other legislation thereunder. And courts, always keeping in view this principle, have always hitherto, with great uniformity, disclaimed jurisdiction not thus expressly given, and always taken notice of an objection to their jurisdiction whenever it occurred and however presented, even against the consent of parties.

The only jurisdiction possessed by the several courts of this Territory is derived from the acts of congress, either directly conferred, or by authority delegated to the legislative assembly of the Territory to confer the same. So that in order to ascertain the jurisdiction of our courts we must first look to the acts of congress relative thereto, all of which is contained in the ninth section of the act organizing this Territory. By virtue of this act, the Territory is vested with four distinct courts, viz.: a supreme court, district courts, probate court and justices of the peace. Upon the supreme and district courts the act directly conferred *appellate* and *original* jurisdiction, and also chancery and common-law jurisdiction. Upon the probate and justices' courts it conferred *no* jurisdiction, but confided the same solely to the legislative assembly of the Territory. It provides : " The jurisdiction of the several courts herein provided for, both appellate and original, and that of probate courts and of justices of the peace, shall be as limited by law, *provided* that justices of the peace shall not have jurisdiction of any matter in controversy when the title of land may be in dispute, or where the debt or sum claimed shall exceed \$100; and the said supreme and district courts, respectively, shall possess chancery as well as common-law jurisdiction."

From this provision of the Organic Act it is claimed that this court can exercise original jurisdiction in mandamus, simply be-

cause of the words "The jurisdiction of the several courts herein provided for, both *appellate* and *original*, * * * shall be as limited by law." Such would be a forced construction in favor of jurisdiction, a construction unwarranted and unknown to the law. When the congress of the United States created the courts of this Territory it classified the jurisdiction between the supreme and district courts, and in so doing confined and conferred upon one appellate and upon the other original jurisdiction, and thereby prohibited the legislative assembly of the Territory from in any manner transferring or altering the same, but it left to it the power to regulate the extent, and the mode and manner in which the courts should exercise the same; that is, the manner in which the supreme court should exercise appellate jurisdiction, and the district courts original jurisdiction.

The words, "the several courts," clearly refer to the supreme court, with its jurisdiction *appellate*, and to the district court with jurisdiction *original*.

What was evidently intended by the Organic Act, which provides that "The jurisdiction of the several courts herein provided for (meaning the supreme and district courts), and that of probate courts and of justices of the peace, shall be as limited by law," was, that the legislative assembly might limit by law the jurisdiction *appellate* of the supreme court, and the jurisdiction *original* of the district courts, with *sole* power over the other courts except as to the amount in controversy and the title to lands.

This construction of the Organic Act is in perfect harmony with the distinction ever intended to be observed between similar superior and inferior courts, and thus relieves the judicial system from that complex and unprecedented condition into which it would fall if *both* courts exercised jurisdiction alike, and without the right of appeal. Such has hitherto been the limit recognized by our legislature, as well as all others possessing a similar Organic Act.

But the chief justice, in his elaborate and exhaustive opinion, insists, that if such be the correct construction of the Organic Act then all appeals from the inferior courts to the district courts are without authority and void. Such assertion and such conclusions are without foundation in law. The very chief functions of a

supreme court are the exercise of appellate and supervisory jurisdiction over inferior tribunals. And the uncontroverted doctrine relative to the scheme of judicial tribunals is, that one of the great missions of courts of record, having original jurisdiction, is to receive appellate jurisdiction under legitimate legislation, and to all such courts appellate jurisdiction is necessarily implied. But it was never the province of supreme appellate courts to receive original jurisdiction, unless expressly conferred upon them by law. But if this long and well-established doctrine is to be overcome by mere assertion, without authority or logical reasoning, I can no better maintain my proposition than by referring to the second section of our amended Organic Act, where express provision is made for appeals from the inferior courts to the district courts. Our legislature recognized this fundamental law and engrafted the same into our practice, and then made express provision for all such appeals to the district court. Cod. Sts. 161, § 621.

Again, the chief justice seeks to support his view of original jurisdiction under the grant extending to "the several courts" chancery and common-law jurisdiction. The conferring of this jurisdiction certainly did not create any new powers or originate any new modes of administering justice. If this doctrine of indiscriminate jurisdiction be correct, then in all cases wherein the district court has original jurisdiction the supreme court has the same, and when exercising it, as in the case at bar, we would have no appellate court. Such would not only be manifest injustice to the suitor, but would defeat the expressed will of congress.

This effort to take jurisdiction, *both* at common law *and* under the statute, is in direct opposition to the holding of the supreme court of the United States in the case of *Williamson v. Berry*, 8 How. (U. S.) 495, where the court holds that a court of chancery or equity powers, exercising jurisdiction in particular cases by virtue of a special statute, cannot deviate from the letter of the act, nor make a decree founded part upon the statute and part upon its general jurisdiction (as in the case at bar). See, also, *Bollman v. Swartwout*, 4 Cranch, 93; *Sheldon v. Sill*, 3 How. (U. S.) 441.

The authorities cited in the opinion of the court in favor of jurisdiction are few, meagre, and to me quite unsatisfactory. But one single authority is cited from territorial courts, that from Colorado, where one of the three judges was a party to the suit, and the other two, disagreeing, whereby the writ was denied. And in that case the question of jurisdiction over the *subject* of the action was *not* raised; it was the jurisdiction of the court over the *person* of the defendant only that was raised. *People v. Hallett*, 1 Col. 362.

The case of *Kendall v. United States*, 12 Peters, is cited in the opinion of the court in support of the jurisdiction. This is a case containing 48 pages, and it is not strange that, in the short time the court has had in which to examine the many authorities presented on the various questions involved, it should be led into error, as it evidently has been. This case is not analogous to the one at bar. Instead of supporting the proposition, maintained by a majority of the court, it more nearly maintains the doctrine that no court can exercise original jurisdiction in mandamus unless expressly conferred upon it, as in that case it was conferred upon the circuit court of the District of Columbia. Let any disinterested, unbiased lawyer carefully examine that opinion, and he will readily see its inapplicability to the case at bar.

The case of *Hornbuckle v. Toombs*, 18 Wall., is also cited in support of the position of the court. This decision, when construed in the light of the facts, comes far short of being an authority therefor. The most that is there held in support of the authority of the legislative assembly to confer this jurisdiction is, that such power *may* be conferred, subject, however, to *specified* or *implied* conditions. This, instead of being authority in favor of the jurisdiction, is, by analogy and parity of reasoning, in opposition to it; for I maintain that our Organic Act not only *implies* that this jurisdiction shall not be conferred but by a fair and reasonable construction; it *specifies* that it shall not be except in an appellate form.

I am well aware that excerpts may be selected from different decisions, especially in *obiter dicta*, which would seem to present an apparent difference in the holdings of courts upon this question; but when the facts, in each case, are carefully consid

ered, and those excerpts and *obiter dicta* construed in the light of the facts in each case, it will be found that there is no substantial difference in the rulings of the courts upon this question. But even were I to concede that the Territorial legislature had power given it, whereby to confer jurisdiction upon this court, I insist that it never did confer it.

The only pretended authority is from section 518 of our Practice Act, which provides, "it (the writ of mandate) may be *issued* by any court in this Territory except a justice's, probate or mayor's court." No one doubts but that the supreme court in the exercise of *appellate* jurisdiction could *issue* such a writ. But that it was not given original jurisdiction to hear, determine or issue the writ, is, to me, from an examination of the statute seeking to regulate the practice in mandamus, too apparent to admit of argument. Let any lawyer carefully examine section 523 of that act, where it is provided that the court may (and as I think in justice, it always ought) grant a trial by jury, and then let him imagine what speedy justice would be guaranteed in a court that need not convene only once a year. Let him also examine section 525 of that act which relates to motions for a new trial, which are to be brought on before the *judge* — not the three judges. Let him examine every section of that act, and I submit, the inevitable result of his investigation will be that our entire statute upon mandamus is wholly inapplicable to any other than the district courts. But I will not longer pursue this branch of the case, and will refer to the following authorities, viz.: Article 3, Constitution United States; *Marbury v. Madison*, 1 Cranch, 174; 3 Abb. N. Digest, 245, § 5; *People v. Kern. Co.*, 47 Cal. 205; *Tyler v. Houghton*, 25 id. 28; Smith's Com. Const. Law, §§ 445, 490, 491; *Kendall v. United States*, 12 Pet. 524; Cod. Sts. 160, § 617. And wherein district courts have original jurisdiction, "as limited by law," see Cod. Sts. 161, §§ 620, 621, 622, 624.

Second. As to the sufficiency of the complaint.

This is an action against the governor, the secretary and marshal of the Territory, to compel them to procure an abstract of the votes of Meagher county, and to canvass the same with those of the other counties, and to proclaim the result, upon the alleged ground that the abstract of Meagher county, as canvassed, was incorrect, false and forged.

Before the writ of mandamus will ever issue there must be a default — and there must also be a demand — a request to perform the required duty. There is neither fraud, default or demand averred against the defendants by the plaintiffs. The fifth and sixth sections of the laws of the eighth session, p. 45, together with the twenty-ninth and thirtieth sections of the codified laws, p. 466, define the respective duties of the defendants upon this subject. It nowhere makes it the duty of the governor or marshal to send for or procure defaulting abstracts. The secretary alone is required to do this, and the legal presumption is that he would do so when requested ; if not, then, and then only, would this action lie against him. But to assume that the marshal and governor would, when such abstracts were procured, refuse to perform the duty, then, and not until then, enjoined upon them by law, would be an unwarrantable assumption by any court. The duty required is not a *joint* one, until after all the abstracts are procured. Had *no* abstracts been procured, could the governor and marshal, or either, have been required to procure them ? Clearly not. Then how are they proper parties to this suit, to be subjected to costs and the vexation of defending the same ?

As to the necessity of averring and proving a demand and refusal, some authorities have been cited, such as *High on Ex. Leg. Rem.*, and *State v. Bailey*, 7 Iowa, 397, which, at first sight, would seem to be innovations upon the long and well-established rule which requires a demand to precede the action. But upon a careful and critical examination of these few authorities it will be found that the rule, as there laid down, only seeks to vary the rule in cases of seeming absolute necessity, arising, as these authors say, “where no individual interest is affected, and where no one is empowered to make demand,” which is not the case at bar. Here the plaintiffs aver an individual interest, and make that the very basis of their right to maintain the action. If so, they have the authority to make the demand, as was always required by law, in all ages, under like circumstances, as is so authoritatively recognized and sanctioned by the following authorities: *Moses on Mandamus*, 18, 202, 204; *Tapping*, 282; *United States v. Boutwell*, 17 Wall. 607; *People v. Romero*, 18 Cal. 91; *Crandall v. Amador Co.*, 20 *id.* 75; *A. &*

A. on Corp., § 707; *Rex v. Wilts C. Co.*, 3 A. & E. 481, and the numerous authorities there cited.

Third. The remaining point, from which I dissent, is that of denying the right of trial by jury, which, being announced orally, I cannot now recall the exact language used by the court as reasoning therefor, except the discretionary power as contained in the 523d section of our Practice Act. Courts, when attempting to exercise judicial discretion, would be more likely to administer justice according to law by observing the doctrine of Chief Justice MARSHALL, who says: "When courts are said to exercise a discretion, it is a mere legal discretion; a discretion to be exercised in discovering the course prescribed by law, and is never exercised for the purpose of giving effect to the will of the judge."

If, then, this is an action under our Code of Practice, and an issue of fact joined, which is not denied, then section 190, p. 64, is in direct conflict with section 523, p. 142, from which my brethren derive their discretion power, whereby they denied the right of trial by jury; for, by section 190, it is provided that all issues of fact *shall* be tried by a jury, unless it be waived.

But the supreme court of the United States has, very lately, set at rest any doubt as to the *character* of this action. In *Heine v. Levee Commissioners*, 19 Wall. 660, Justice MILLER, in delivering the opinion of the court, says: "Mandamus is essentially and exclusively a common-law remedy, and is unknown to the equity practice."

Although it has, at all times, been the uniform practice of courts to try all such issues of fact by jury, yet congress, perhaps fearing that Territorial courts might do as has just been done, did, in April, 1874, pass an act entitled "An act concerning the practice in Territorial courts," wherein it is provided: "That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." 18 U. S. St. 27.

Here, then, the supreme court of the United States has declared mandamus to be exclusively a common-law remedy, and the congress of the United States has guaranteed to it the right of trial by jury. But the supreme court of Montana ignores it all and denies this right.

With all due deference to and respect for the opinion of my brethren, and with an equal desire that right and justice shall be maintained, yet, to judicially obtain the same in utter disregard of the plain provisions of the law, as I understand it. I can never give my assent.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1875, HELD IN HELENA.

Present:
HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, ASSOCIATE JUSTICE.

BARKLEY, respondent, *v.* LOGAN, appellant.

APPEAL — *notice—jurisdiction—no appeal from part of a judgment.* The notice of appeal controls the jurisdiction of the appellate court. The sections of the statute conferring jurisdiction must control that which provides how an appeal shall be taken. An appeal from only a portion of a decree or final judgment is not authorized by statute, and cannot be entertained. The appellate court must have jurisdiction of the whole of a judgment to review any portion thereof; the modification of one portion might require the modification of the whole.

Appeal from First District, Jefferson County.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for appellant.

JOHNSTON & TOOLE, for respondent.

Appellant cannot appeal from part of a decree. This court must have the whole case before it to make a proper modification.

The present appeal will not authorize a review of any errors assigned.

WADE, C. J. This is an action for a perpetual injunction to restrain appellants from the use of certain waters of Indian creek, Jefferson county. It appears that respondent and appellants are the owners of ditches that convey the waters of said creek to the mines in the vicinity. The findings of facts by the court show the ownership of the ditches, the dates of their construction, their carrying capacity, in miners' measurement, and their priorities. The decree is based upon such findings.

The appellants, being satisfied with the greater portion of the decree, gave notice of an appeal from that part which awarded priority to the ditch known as the Cedar Gulch ditch over that known as the South Bowman ditch.

The first question for determination is this: Can an appeal be taken to this court from a part of a final judgment? Can a judgment be severed into distinct parts and an appeal be taken from each, at different times, without bringing the whole judgment before the appellate court? The appellants have appealed from a part of the judgment now, but this does not preclude the possibility of an appeal by them at another time from some other portion of the decree.

The appellate jurisdiction of this court is defined by law, and the statutes confer jurisdiction in a particular manner in certain cases. In no other way than by following the law can this jurisdiction be acquired.

Sections 369 and 380 of the Practice Act define the appellate jurisdiction of this court, and, in substance, declare that an appeal may be taken from a final judgment; from an order granting or refusing a new trial; from an order granting or dissolving an injunction, or attachment; from any special order made after final judgment, and from interlocutory judgments in actions of partition. In these and in no other cases has this court appellate jurisdiction.

How is this jurisdiction acquired? Section 370 of the Practice Act provides, that an appeal shall be made, by filing with the clerk of the court in which the judgment or order appealed from is

entered, a notice, stating the appeal from the same, or some specified part thereof, and serving a copy of the notice upon the adverse party, or his attorney. The notice defines what is appealed from, and controls the jurisdiction of the appellate court. If the appeal was from a final order made after judgment, it would not bring the judgment before the court; if it was from a part of a decree, it would not give jurisdiction to this court over the whole decree.

We do not think the statutes contemplate an appeal from a part of a judgment. Sections 369 and 380 define the appellate jurisdiction; and section 370, providing how an appeal shall be taken, does not enlarge this jurisdiction. The sections conferring jurisdiction must control, instead of what is incidentally said in the section providing how the appeal shall be taken.

When an appeal is taken from a judgment, it must be from the whole of it. The statute does not authorize the taking of a judgment into an appellate court for review by piecemeal. The appeal must bring the whole judgment before the appellate court. This court cannot reverse or affirm the fragment of a judgment. Jurisdiction for this purpose has not been conferred. If the whole decree is not before this court, how can it know the effect of its action, in reversing or affirming a portion of it, upon the remainder over which this court has no jurisdiction, because there is no appeal therefrom?

The appellants appeal from that part of the decree which gives priority to the Cedar ditch over the Bowman ditch. What effect would a reversal of this part of the decree have upon the remainder thereof? We cannot say. The decree is not here so that we can notice it. Would such a reversal require a modification of the other part of the decree? It might. We cannot modify it while the main portion of the judgment is in the district court and subject to its jurisdiction. Suppose we should reverse the part of the decree appealed from, and send it back for a new trial, and the appellants should then appeal from another portion of the decree, where would the case end? When would the rights of the parties be finally determined?

We hold that this court, under the statute, has no jurisdiction to hear an appeal from a part of a final judgment, unless the whole judgment is before it. The whole judgment must be

appealed from to give this court jurisdiction over any particular portion. In *Canter v. American Ins. Co.*, 3 Pet. 316, Mr. Justice STORY says: "It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses." And the principle applies as well to successive appeals from portions of a final decree as to appeals upon matters arising before the final decree is rendered. In the latter case the appeal is not allowed, because the final decree has not been rendered, and in the former case the appeal should be disallowed, because it only brings fragments of the decree before the court. For the purpose of determining the rights of the parties, the portion not appealed from may as well never have been rendered.

Freeman on Judgments, says (§ 33): "The policy of the laws of the several States, and of the United States, is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal." He is speaking of appeals before final judgment, yet we believe that the same reasons apply to prevent piecemeal appeals after final judgment. This must be the case where the statute specially prohibits such appeals, by authorizing an appeal from a final judgment, which can only be construed to mean the whole thereof.

The party appealing must bring the whole decree before the appellate court, otherwise it has no jurisdiction to hear the case, and may specify, in his notice of appeal, the portion of the decree he wishes to reverse. He cannot sever the decree, and leave that portion of it favorable to himself in force in the district court, and appeal from that portion adverse to him.

There being then no appeal authorized by the statute, it is dismissed, and this cause is stricken from the calendar.

Appeal dismissed.

DUNPHY, appellant, v. FORD, respondent.

ARBITRATION — *submission* — *award* — *statute requisites*. In a submission of a controversy to arbitration under the statute, the law requires that all the arbitrators should meet and act together during the entire investigation, but a majority may decide any question. And where one of the arbitrators was absent during part of the investigation, though he may have authorized one of the other arbitrators to sign his name to the award that they should agree upon, such investigation could not lawfully proceed in his absence. The award was null and void and no valid judgment could be entered thereon.

Appeal from First District, Gallatin County.

CHUMASERO & CHADWICK, for appellant.

The judgment entered upon the award in this case was erroneous. The proceedings before the arbitrators did not comply with statute requirements.

One of the arbitrators was not present after the first day's investigation. This rendered such subsequent proceedings void. *Heath v. Tenney*, 3 Gray, 380; *Burghardt v. Owen*, 13 id. 300; *Franklin M. Co. v. Pratt*, 101 Mass. 359-362; *Bulson v. Lohnes*, 29 N. Y. 291.

PAGE & COLEMAN, for respondent.

WADE, C. J. This is an appeal from an order overruling a motion to vacate an award, and from a judgment for respondent thereon.

It appears that on the 19th day of September, 1873, the parties hereto entered into an agreement in writing, to submit the matters in dispute between them to the arbitration of T. I. Dawes, S. W. Langhorne and Nelson Story, and that the award thereon be entered as a judgment of the court, in pursuance of the statute in such cases provided. On the 16th day of October, 1873, the defendants caused to be filed with the clerk of the court, the award signed by Langhorne and Dawes, for themselves, and signed by Dawes for Story, at his request. The defendants then moved for judgment thereon, and at the same time the plaintiff filed a motion

to vacate the award. These motions were heard by the court, and it appears that the three arbitrators met on a certain day and heard a portion of the testimony, and then adjourned. Story could not be present at the adjourned meeting, and the other arbitrators heard the remainder of the testimony and made an award, in the absence of Story, which award had been agreed to by Story before he was called away by his business, provided the subsequent testimony to be offered did not change the cause materially. The two arbitrators who were present, thinking that this testimony did not change the rights of the parties, made the award and signed their own and Story's name to the same. The court entered judgment for respondent thereon, and overruled appellant's motion to vacate it.

The statute under which this arbitration was had provides as follows: "All the arbitrators shall meet and act together during the investigation; but, when met, a majority may determine any question. Before acting, they shall be sworn, before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matter in controversy, and to make a just award according to their understanding." Civ. Pr. Act, § 436.

It seems clear, that, when three arbitrators have been agreed upon and appointed to hear and determine a controversy, they must meet and act together. Two of them have no authority to hear testimony in the absence of the third, and an award made upon testimony so taken is void. This is the meaning of the statute. They "shall meet and act together." A jury cannot legally hear evidence and render a verdict in the absence of one of the jurors; neither can arbitrators hear and determine a matter submitted to them, and make an award, in the absence of one of the arbitrators. The statute clothes the arbitrators with jurisdiction in a certain manner, and they have no authority unless they comply strictly with the law. Therefore an award made by two arbitrators upon testimony heard by them, when the submission was to three arbitrators, is void. Courts can only acquire jurisdiction over awards of arbitrators to enter judgments thereon when the submission and award are in conformity to the statute.

The case of *Bulson v. Lohnes*, 29 N. Y. 291, is in point. There was a submission to three arbitrators, and the award must be in writing and signed by the three or any two of them. Two of the arbitrators met, heard the proof and made the award, which was adjudged a nullity by the court. To this effect are the following cases: *Heath v. Tenney*, 3 Gray, 380; *Burghardt v. Owen*, 13 id. 300; *Low v. Nolte*, 16 Ill. 475; *Jeffersonville R. Co. v. Mounts*, 7 Ind. 669; *Franklin M. Co. v. Pratt*, 101 Mass. 359.

This question is not affected by the fact that it was stipulated in the submission that P. W. McAdow should act, if Story was absent at the first meeting of the arbitrators, or refused to act. Story was not absent and did not refuse to act, but was present while some of the testimony was heard. The two arbitrators, without substituting McAdow, heard the remainder of the evidence and made the award, and signed their names and that of Story thereto. The matter in dispute was submitted by the parties to three arbitrators, and was heard and determined by two of them. This award is therefore void. They did not "meet and act together."

The respondent offered testimony, which was controverted by appellant, to show that the parties agreed, after the departure of Story, that Dawes and Langhorne might arbitrate this matter. It is not proved that this was the agreement, which would be a new submission and should have been in writing under the statute. Neither party claims that it was in writing.

The judgment is reversed and cause remanded.

Judgment reversed.

DUNSCHEN, appellant, *v.* HIGGINS, respondent.

PRACTICE — *appeal — variance — presumption.* In order that the appellate court may take notice of an alleged variance between the summons and the copy served, the record on appeal should set out such variance so that the court may determine its materiality, else it will be presumed to have been immaterial and will be disregarded.

SUMMONS — *service — copy of complaint — usage — inconsistency.* The service of summons with a true copy of the complaint, though such copy was not certified by the clerk as required by section 34 of the Civil Practice Act, is a sufficient compliance with section 36 of the same act, and gives the court jurisdiction to try and determine the case. Such service is according to general understanding and usage, and if the sections are inconsistent the subsequent should have greatest weight.

Appeal from Second District, Missoula County.

HIGGINS recovered judgment in the probate court of Missoula county against Dunschen, and the sheriff satisfied the same by selling Dunschen's property. Dunschen then brought this action for the wrongful conversion of his property, on the ground that the probate court never acquired jurisdiction, and that its judgment was void.

W. J. STEPHENS, for appellant.

MAYHEW & McMURTRY, for respondent.

WADE, C. J. This is an action for the unlawful conversion of personal property. The defendants aver in their answer that the property in question was attached, at the suit of *Higgins v. Dunschen* in the probate court, and sold upon a judgment in favor of the plaintiff and against the defendant in that action.

A jury was waived and the case submitted to the court, who made findings of facts, and, among them, the following, upon which the questions in this appeal arise:

"I find, as a fact, that the sheriff served on defendant (in the suit of *Higgins v. Dunschen*) a copy of complaint, and copy of summons; but not a certified copy of complaint, nor a true copy of summons."

Upon this finding the appellant makes two questions: 1. "That a true copy of the summons was not served on Dunschen." 2. "That no certified copy of the complaint was served upon him as the law then required."

The variance between the original summons and the copy served is not disclosed. If in a material particular it would vitiate, but if in a matter wholly immaterial it would not. We cannot presume that it was material, and declare the service of the summons void.

2. We must consider the second question as if the first one had not been raised, and it must be deemed that a true copy of the summons was served upon the defendant. No *certified* copy of the complaint was served upon the defendant, but a *copy* of the complaint was so served. The defendant being served with a copy of the summons and complaint, did the court acquire jurisdiction over the defendant to render a judgment against him?

Section 28 of the Practice Act provides: "Civil actions in the district courts and probate courts shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons thereon."

Section 34 provides: "The summons shall be served by the sheriff of the county where the defendant is found. * * * *A copy of the complaint, certified by the clerk, shall be served with the summons.*"

Section 35 provides: "It shall be the duty of the clerk issuing the summons * * * to make out a *copy or copies* of the complaint, and deliver the same to the * * * officer * * * executing such summons."

Section 36 provides: "A summons shall be executed, except as otherwise provided by law, as follows: First, by reading the writ to the defendant, and delivering to him a *copy* of the complaint; or second, by delivering to him a *copy of the complaint and writ* * * *."

It is our duty to harmonize sections 34 and 36, if possible, rather than declare one void. Since the amendment to the Practice Act, this question cannot arise, but it is important respecting cases tried before the amendment. The court acquires jurisdiction over a defendant by the service of a summons upon him in the manner provided by law. The summons informs the defendant of the matter of the plaintiff's complaint against him. "The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, the cause and general nature of the action. * * *." Civ. Pr. Act, § 30. If no copy or certified copy of the complaint was served with the summons, no injury could result to the defendant, because he would be informed by the summons that he was a

defendant in court, and of the plaintiff's claim. A certified copy of the complaint could do no more than this.

The appellant received from the sheriff a copy of the complaint, and a copy of the summons, which was not a true copy of the summons. From this finding of the court, we can infer that Dunschen received a true copy of the complaint, or the contrary would have been found. What does the declaration that he received a copy of the complaint mean? It is a fair construction that he received a perfect copy of the original. A copy is a duplicate of the thing itself. A copy is perfect, whether certified or not, and with the summons the appellant received such a copy, a true copy of the complaint.

Did such service give the court jurisdiction of Dunschen? Must the copy of the complaint, accompanying the summons, be not only a true, but a certified copy also? If a certified, it might not be a true copy, and if true, the certificate could not make it more true. The certificate can add nothing, or cure the defect if it is untrue, and is a formal matter if the defendant receives a true copy of the complaint. Every thing has been done that the law required to bring him into court, except a certificate declaring that a true copy of the complaint is a true copy, when he has been informed that the copy he received is true. The court was authorized to render judgment against Dunschen. Said section 36 has been complied with, and this has not been repealed by section 34. If either is repealed, the latest section in the act controls. Both were in force before the late amendments, and the service of the complaint and summons, as directed by either, gave the court jurisdiction. This has been the usage and general understanding, and statutes long acted upon in good faith, under which rights have been settled and determined, ought not to be disturbed for slight causes.

The judgment is affirmed.

Judgment affirmed.

MORSE, respondent, v. SWAN, appellant.

PRACTICE — *findings of fact — rulings of court — surprise — newly-discovered evidence.* To support exceptions to findings of fact or the rulings of court, the record should set out the evidence on which exceptions are based and should show what rulings of the court were erroneous, and that they were properly excepted to at the time. Where surprise is claimed, it must be set forth and show sufficient legal cause. A new trial will not be granted on the score of evidence, cumulative in its nature, and that might have been produced at the first trial.

SAME — *record.* If an attorney desires to obtain advantage of any motion decided in his favor, he should make it in writing, or see that it was made matter of record.

TRIAL BY COURT — *presumptions.* When trial is by the court, the presumption is that every material fact in issue was found in favor of the party recovering judgment, unless the contrary appears of record.

PRACTICE — *demurrer — sufficiency of facts — relief.* An appellate court may consider the sufficiency of facts in a pleading, though the record shows no exception taken to the overruling of such demurrer. A demurrer is not good which goes to the relief only.

CONSTRUCTION — *Section 300, Civil Practice Act.* This section of the statute provides no new remedies or proceedings to redress the trespasses therein named. It only gives additional pecuniary relief.

Appeal from First District, Gallatin County.

THIS was an action for trespass, and the prayer for relief claimed treble damages, as provided for by section 300 of Civil Practice Act. The trial was by the court, and the findings and judgment in favor of plaintiff.

S. WORD and G. MAY, for appellant.

Appellants claim that the court below erred, in overruling their demurrer to plaintiff's complaint; sustaining oral motion to strike out part of complaint without having the record show the same; requiring defendants to answer over instantar; rendering judgment against defendants; overruling motion for new trial and vacating the decision of the court.

This action is brought under a punitive statute, and must stand or fall by that statute. The findings of court do not show plaintiff to have been in possession of the premises at the commencement of this action. This was necessary to sustain the action.

R. P. VIVION and M. C. PAGE, for respondent.

1. The demurrer was to the whole complaint and was properly overruled, if the same contained a cause of action sufficiently pleaded.

2. The demurrer, as to ambiguity and uncertainty, does not point out in what it consists, and should have been disregarded.

3. The demurrer goes only to the relief. If plaintiff was not entitled to treble damages, it might have been stricken out on motion, or would have been mere surplusage if it stood.

KNOWLES, J. No bill of exceptions was taken in this case. We find a motion for a new trial, the order overruling the same, and a statement that this ruling was excepted to. This motion is as follows: "And now comes the defendant * * * and moves the court for a new trial and vacation of the decision and judgment of the court herein rendered for the following reasons, to wit:

1. "Because of the insufficiency of the evidence to justify the verdict or findings and decision, and that the same is against law.

2. "Error in law occurring at the trial and excepted to by the defendant.

3. "Surprise which ordinary prudence could not have guarded against."

No statement of the evidence is set forth. This court cannot determine whether the findings of the court were unsupported by the evidence, or whether they are against law. The record does not disclose any rulings of the court upon questions of law, occurring at the trial, to which appellant excepted. The record does not disclose any matters that were a legal surprise to appellant. The affidavits of appellant and of Bowers go to the point, that the building torn down by the defendant was not worth more than \$150. The value of this building was an issue in the case.

This court cannot tell whether this evidence would be cumulative, for it does not know what evidence was produced on the trial. There is no reason shown why this evidence in these affidavits could not have been produced on the trial. It appears, from the affidavit of appellant, that the finding of the court, as to the value of the house and milk-house, was supported by evidence.

In this affidavit he says: "There are excessive and punitive values placed upon said improvements, instead of real and true values, *although seemingly sustained by the testimony.*" A new trial cannot be granted on the ground of newly-discovered evidence, unless it appears that this evidence is not cumulative, and could not have been produced on the trial.

The appellant claims to be surprised, for the reason that his attorneys told him that the consideration paid for the pre-emption tract of land made no difference in this case. The findings of the court show that it did not, and he could not have been surprised by this advice. I think the court properly overruled the motion for a new trial. It appears imperfectly, from the record, that the appellant moved orally to strike out a part of the complaint. This motion was sustained.

Appellant complains because the record does not show the motion or what part of the complaint was stricken out. There is no error of which the appellant can complain. If he had made his motion a part of the record, the ruling would be plain. It is difficult to comprehend what counsel think is the province of a court when they assign such matters as error. If an attorney fails to make his motion a part of the record, and a ruling in his favor becomes obscure, it is claimed that a judgment in favor of an opposite party should be set aside. The statement of such a proposition is a sufficient answer to it. It is assigned as error that the findings do not show that the plaintiff was in possession of the property upon which the trespass was alleged to have been committed, at the time of the perpetration thereof. They do not show that he was not. This question was an issue in the pleadings. The presumptions are, that the court found thereon in favor of the plaintiff. Judgment was given for plaintiff. This court has held, and the decisions are numerous, that where a judgment is given it will be presumed, unless the contrary appears, that the court that entered the judgment found every material fact at issue in favor of the party for which it gave judgment.

Appellant alleges that the court committed an error in overruling his demurrer. It does not appear that this ruling was excepted to.

The ground specified in the demurrer, that the complaint does not state facts sufficient to constitute a cause of action, notwithstanding the failure to except to the ruling thereon, may be considered by this court. It is claimed that this is an action brought under the provisions of section 300 of our Civil Practice Act, and that the facts set forth in the complaint do not show a cause of action under that statute. This brings to our consideration the interpretation of that statute. It is not a statute providing a new remedy for the trespasses it specifies. The proceedings to redress those trespasses are the same as the proceedings to redress any other private trespass. Its only effect is the giving of additional pecuniary relief. It gives, in the class of trespasses named, treble what would be the actual damages sustained.

In the complaint sufficient facts are set forth to constitute an action for trespass. The trespass complained of is not of the class specified in section 300. The plaintiff claims that he is entitled to treble damages by virtue of this section. Undoubtedly he is not. If a party claims greater or different relief from that to which the facts he alleges entitles him, can it be maintained that his complaint does not state facts sufficient to constitute a cause of action.

This court has held that a demurrer which goes only to the relief asked cannot be sustained.

The supreme court of California holds that a party is entitled to any relief to which the facts set forth in his pleadings show him entitled, no matter what relief he may ask. *Althof v. Conheim*, 38 Cal. 230; *Grain v. Aldrich*, id. 514; *White v. Lyons*, 42 id. 279; *Moak's Van Santvoord's Pleadings*, 272, 279.

The judgment of the court is affirmed.

Judgment affirmed.

DAVIS, appellant, v. CLARK, respondent.

PLEADING — *new matter* — *replication*. Whenever the answer in a cause pending sets up new matter, authorized and constituted by statute as a defense in such action, a replication is necessary, or such new matter will be held as admitted by plaintiff, and he will not be allowed to introduce testimony to contradict or disprove such admissions.

LIMITATION — *general and special provisions*. The general law of limitation of actions for the recovery of real estate is limited by special provisions applicable to placer mines and quartz lodes. The specific and not the general law must control such cases.

Appeal from Second District, Deer Lodge County.

THIS action was instituted to try the title and recover possession of certain quartz mining ground, claimed by the appellant under title from the earlier discovery and location as the "Original Lode," and adversely claimed by respondent under a subsequent location, as authorized by statute, and actual adverse possession for more than one year.

CHUMASERO & CHADWICK, for appellant.

There is no new matter contained in the answer that requires a replication. See Practice Act, §§ 56, 57, 73, 74.

Pleading title in defendant or an adverse possession is equivalent to a denial of the title and possession of the plaintiff, and nothing more.

The statute (Cod. Sts. 591-2) does not change the rules of pleading in actions to recover the possession of realty.

The portions of answer requested to be stricken out by plaintiff constituted no defense, and the motion should have been sustained.

It was error to reject the evidence offered by plaintiff.

SHARP & NAPTON, for respondent.

The evidence offered by plaintiff was properly rejected. The facts constituting the third defense in answer were not denied, and therefore admitted. Judgment should have been given to defendant on the pleadings.

The defense is new matter, required by statute to be pleaded. See Cod. Sts. 592.

Where the onus of proof of any allegation is thrown upon defendant as to such, it is new matter. In California new matter in answer is considered denied without a reply.

Affirmative allegations may be mere denials, but not allegations of adverse possession. Possession might have been in plaintiff at the commencement of the action, and adverse possession in the defendant. Defendant may have been the owner and plaintiff tenant.

The statute defines adverse possession. Cod. Sts. 592, § 4; *Simson v. Eckstein*, 22 Cal. 580; *Le Roy v. Rogers*, 30 id. 229.

Courts of equity follow courts of law in regard to limitation. Angell on Limitations, 396, 399, 401.

WADE, C. J. This is an action to quiet title. The plaintiff alleges that on the 12th day of August, 1864, his grantors and predecessors in interest discovered on the public lands of the United States, in the Summit Mining District, county of Deer Lodge, a certain quartz lode, bearing copper, silver and other precious metals, which was then named, and since has been known as the "Original Lode," which was recorded according to law; that plaintiff is the owner of the undivided one-half of claim number one, east from discovery; that the grantors, and predecessors in interest of the plaintiff, have been, and the plaintiff is in the actual possession of the undivided one-half of said claim; that defendant wrongfully, and by reason of a pretended relocation, claims an estate therein adverse to the plaintiff, whereby a cloud is created upon plaintiff's title. He asks judgment that he be decreed the owner of the claim, and that the defendant be forever barred of all claim of any right therein, by reason of his pretended claim. The answer is a specific denial of each allegation of the complaint, and as a separate defense, avers that plaintiff or his grantors have never procured any patent to any portion of the "Original Quartz Lode," and that they, nor either of them, have been in the actual possession of any portion of said lode within one year next before the commencement of the action. As a further defense, the answer avers that the defendant, and his grantors and predecessors in interest, on the 25th day of May, 1872, went into the actual possession of said lode, and commenced working

thereon, and since that time have been in the peaceable possession thereof under a claim of title made in accordance with the laws of the Territory, and that such title has been adverse to that of the plaintiff for the period of more than one year next prior to the commencement of the action. There was a motion to strike out these separate defenses, which was overruled, and the cause was brought on to a trial upon the complaint and answer, no replication having been filed to the separate defenses set up in the answer. The plaintiff offered to prove the staking and recording of the claim in accordance with the requirements of the statute, and that ever since its location the plaintiff and his grantors have possessed the same; that no one had held the possession thereof adversely to the plaintiff, and that the lode was valuable for the precious metals it contained; which proof was excluded. The defendant moved for judgment upon the pleadings, which motion was granted, and judgment entered accordingly.

The question we are to determine is this: Did the answer contain new matter constituting a defense to the action? If it did, a reply was necessary, and in default thereof the plaintiff admitted the defendants' title, and possession of the property, and abandoned his claim thereto. There was no issue upon which testimony could have been introduced. Every material allegation of an answer, not controverted by a replication, shall, for the purposes of the action, be taken as true. When a defense is thus admitted, the plaintiff can introduce no evidence to maintain his action. He cannot dispute, by his testimony, his admissions upon the record. In the general limitation act, it is provided that in every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have possession thereof, within the time prescribed by law, and the occupation of the premises by another shall be deemed to have been under such legal title, unless it appears that such premises shall have been held and possessed adversely to such legal title for three years before the commencement of the action. If this statute controlled the case, the question herein could not arise. The defendant only claims adverse possession for the period of more than one year, next prior to the

commencement of the action. The limitation act referred to is general, and relates to real estate. It controls the right of action in those cases not specially provided for by law. In any class of actions, where the statute specially defined the limitation, the general act does not apply, and the particular act does not conflict with the general act.

In actions to recover any quartz lode, the statute has made special provisions concerning the limitation of the right of action, and has provided what adverse possession, under a claim of title, shall constitute a defense to such action.

Section 2, Cod. Sts. 591, is as follows: "No action to recover any mining claim, whether placer or quartz, or any quartz lead or lode, or any interest therein, or possession thereof, unless the same be held under patent from the government of the United States, shall be commenced or maintained, unless that it is proved that the plaintiff, or his assigns, or predecessors in interest, were in the actual seizin or possession of such mining claim, quartz lead or lode, within one year next before the commencement of such action; and unless it is further proved that such plaintiff, or his assigns, or predecessors in interest, have complied with the rules and customs of the mining district in which such placer claim is situated, or with the laws of the Territory relating to quartz leads and lodes, as to such claim, lead or lode."

Section 4 of the same act defines what shall be a sufficient defense to such action, as follows: "It shall be a valid and sufficient defense if pleaded in any action to recover any mining claim, whether quartz or placer, or any quartz lead or lode, or interest therein, or the possession thereof, unless the same shall be held under patent from the United States government, for the defendant to prove that his assigns or predecessors in interest have been in peaceful possession of such mining claim, quartz lead or lode, under a claim or right, interest or title, made and continued in accordance with the rules and customs of the mining district in which the claim (if a placer claim) is situated, or with the laws of the Territory (if a quartz claim), and adverse to the claim, title or interest of the plaintiff, for the period of one year next before the commencement of such action, and such adverse pos-

session, as above stated, for one year, shall be a bar to the action."

The averments of the answer, under the fourth section of the act above quoted, constitute a complete defense to the action, and in default of a replication these facts are admitted.

The plaintiff contends, that pleading title in the defendant or an adverse possession is a denial of the title and possession of the plaintiff, and that no reply was necessary to form an issue, and that there was no new matter set up in the answer.

In this the plaintiff is mistaken. Under an answer, specifically denying the allegations of the complaint, the defendant could not have proven the defense that the statute authorizes him to make. He could only disprove the plaintiff's case. The plaintiff alleges that he was in possession of the premises at the commencement of the action. Under a denial of this averment, the defendant could prove that the plaintiff was not in possession. He could not prove that he had held the adverse possession of the premises for the period of one year next prior to the date of the action under a claim of title.

To authorize this proof the matter should have been properly set forth as a defense, as it was, and when so set forth it was new matter. Being new matter constituting a defense to the action under the statute, the failure to reply was a confession by the plaintiff of the defendant's defense. There being no issue, the plaintiff admitting the defendant's right, there was nothing left upon which testimony could have been introduced.

The judgment is affirmed.

Judgment affirmed.

TERRITORY, respondent, v. PAUL, appellant.

CRIMINAL LAW — *impeaching witness* — *cross-examination* — *extent of information* — *jury not judge to decide*. An impeaching witness may be cross-examined as any other to discover the grounds and extent of his information. If such witness shows that he has any information on the subject, the testimony should be admitted and the jury not the judge determine what weight to attach to it.

SAME — larceny — intent. It is error to charge the jury that simply killing an ox, with another party, knowing the ox was not the property of that other party, but that it belonged to a third party, amounts to larceny, without adding thereto, “with a view of converting it to his own use, or of permanently depriving the owner thereof.” The error is not cured, though elsewhere in the charge larceny is correctly defined.

EVIDENCE — testimony of wife. The testimony of a wife is not admissible in behalf of a prisoner jointly indicted with her husband where it would tend to influence the case against her husband. The statute does not change the rule of common law.

Appeal from First District, Jefferson County.

JOHNSTON & TOOLE, and SHOBER & LOWRY, for appellant.

1. The court erred in not allowing appellants the right to impeach the character of McDougal for truth and veracity, and refusing appellants, after Worthington had testified that he was acquainted with that character in the neighborhood where he resided, the question, “is that reputation good or bad,” and in passing upon the competency of the witness and rejecting his testimony instead of allowing the jury to pass upon the sufficiency of the same. *Bates v. Barber*, 4 Cush. 109.

2. American authorities agree upon the propriety of the following questions to an impeaching witness: First, “Are you acquainted with the general reputation of the witness for truth and veracity, in the neighborhood in which he lives?” If this is answered affirmatively, then, Second, “Is that reputation good or bad?” 1 Greenleaf on Evidence, § 461; 1 Whart. Crim. Law, § 814. The English authorities and many American allow the further question, “From what you know of the general reputation of the witness would you believe him under oath?”

3. The court erred in refusing to allow the wife of defendant Paul to testify in behalf of defendant Barnes.

W. F. SANDERS, for respondent.

1. Before a witness can testify to reputation it must appear that witness knows that reputation, and his means of knowledge are matters of examination. Witness testifying to reputation occupies similar position as an expert testifying to matters of skill or science. Precedents to the contrary are devoid of reason and based on no legal principle.

2. The testimony of witness showed his incompetency, and of that the judge and not the jury is to decide.

3. Error in a detached part of a charge is to be disregarded, if the charge, taken as a whole, states the law correctly.

4. This was a joint trial of two defendants, and the wife of neither was a competent witness for the other. 1 Whart. Crim. Law, §§ 767-771, and cases there cited.

KNOWLES, J. The principal assignment of error in this case is the rejection, by the court, of the testimony of Worthington, who was called by the defendants for the purpose of impeaching the witness for the Territory, McDougal.

Counsel for the defense introduced the witness, Worthington, and asked him the following questions:

1. "Are you acquainted with the general reputation of the witness, McDougal, in the neighborhood where he lives, for truth and veracity?" Ans. "I am."

2. "Is that reputation good or bad?"

This question was objected to by the prosecution, and the objection sustained.

3. "From what you know of his general reputation for truth and veracity, in the neighborhood in which he lives, would you believe him under oath?"

This question was objected to by the prosecution, and the court sustained the objection, and the defendants excepted. When the first question was answered, the prosecution claimed the privilege of cross-examining Worthington, for the purpose of showing that he did not have the knowledge sufficient of the general character of McDougal, in the neighborhood where he lived, to entitle him to testify as to his general character for truth and veracity. This was granted, and upon this cross-examination the witness said: "That there were about seventy-five people residing in the vicinity of McDougal who would be competent to testify in any case: that he had never heard but thirteen out of that number even speak of the character of the witness for truth and veracity; that a Mr. Belcher was one of them;" and "that he said, in his own house, in July, 1872, that McDougal was a bad man, a drunkard and a thief." "This was when I had McDougal arrested for robbery."

The court then permitted the prosecution to introduce said Belcher, as a witness to the above conversation with the impeaching witness. This was objected to by the defense. Belcher said: "That he had no recollection of ever having any conversation with the witness, Worthington, relative to the character of McDougal, for truth, and would have remembered it if he ever had."

The court held that Worthington had not shown sufficient knowledge of the reputation of McDougal, for truth and veracity, to entitle him to testify concerning the same.

The general rule in the text-books, that treat upon the impeachment of a witness whose reputation for truth and veracity is in question, is this: The witness must be asked: "Do you know the general reputation of the witness, for truth and veracity, in the neighborhood where he lives?" If the answer be in the affirmative to this question, and not otherwise, then the further question may be asked: "What is that reputation?" The English text-books say it is proper to ask the witness, if he says this reputation is bad: "From what you know of this reputation, would you believe the witness under oath?" Some American authorities sustain the same rule. Although the question does not seem to have been considered much, whether the party, whose witness is sought to be impeached, should have the right to cross-examine the impeaching witness, as to his knowledge of the general reputation of the witness whose character for truth and veracity is questioned, it would seem that the right to cross-examine an impeaching witness should be as completely recognized as the right to cross-examine any other witness. This has been the general practice of the courts in this Territory. Whether, if it should appear from the cross-examination of the impeaching witness that he has no knowledge of the general reputation, for truth and veracity, of a witness that is sought to be impeached, the court should have the power to exclude his evidence, is a question upon which I have seen no authority. Is the fact, as to whether a witness has sufficient knowledge of the general reputation of another witness, for truth and veracity, for the court or jury? If a witness answers that he has no knowledge of the general reputation of another witness, for truth and veracity, it would be wrong to allow him to testify to what that reputation was, and the court

has the power to stop the examination of such a witness. If a witness should show, in cross-examination, that he had no knowledge of the general reputation of a witness sought to be impeached, for truth and veracity, it would seem that the court ought to have the power to say that a man could not be impeached by any such witness. When a witness shows he has some knowledge of a man's character, for truth and veracity, in the neighborhood where he lives, I think the rule should be, that the jury must judge as to the weight to be given to his testimony. To hold in all cases the court should determine, from the testimony of a witness, whether he had sufficient knowledge of a man's general character, for truth and veracity, would make it the arbiter of a question of fact. It was contended that an impeaching witness occupied the position of an expert, as to character for truth and veracity.

There are some analogies between the two classes of witnesses. When an expert is introduced, no one would contend that it was the province of the court to determine whether he had sufficient knowledge of the subject upon which he was called to testify to permit his evidence to go to the jury. If a physician should be called upon to testify to a medical point, it would not be the province of the court to determine whether he had sufficient knowledge of his profession to permit him to testify in regard thereto. The witness may be cross-examined as to his medical knowledge, and the jury must judge of his capacity to testify. If the witness should say that he was not a physician and never practiced that profession, he ought not to be allowed to testify to such a point.

We find the witness, Worthington, did say, "that he was acquainted with the general reputation of the witness, McDougal, for truth and veracity in the neighborhood where he lived, and that he had heard some thirteen persons, neighbors of the said McDougal, speak of his reputation for truth and veracity; that there were some seventy-five persons competent to testify in any case, who lived in the neighborhood of McDougal." The court, having no power to determine whether a man has sufficient knowledge of a witness' general reputation for truth and veracity where he has some, erred in excluding the testimony of Worth

ington. The court had no right to say whether a man can receive sufficient information from thirteen men in a witness' neighborhood to his general reputation for truth and veracity. If thirteen men would not be sufficient to impart such information, how many would? The testimony of Worthington to his conversation with Belcher does not seem to have been upon McDougal's reputation for truth and veracity. The introduction of Belcher to contradict Worthington upon this point seems to have had for its object the giving to the court information to enable it to decide whether Worthington did have sufficient information as to the general reputation for truth and veracity of McDougal, to permit him to testify in relation thereto. This introduction of Belcher shows the position assumed by the court in relation to this matter, that it, and not the jury, should determine whether Worthington had sufficient knowledge of the general reputation of McDougal for truth and veracity in the neighborhood where he lived to allow him to testify in regard thereto. This was error.

The second exception is to the following part of the judge's charge to the jury: "I further say to you, gentlemen, as a further matter of law for your application to the proof, that if you should find from the proof that although the defendant William Barnes did not, with the defendant Paul, kill the ox in question, but that he did join with A. W. McDougal in so doing, knowing the same was not the property of McDougal, and shall further find that Addison Myers was the owner thereof, then you should find the defendant Barnes guilty, although he may not have then known who was the real owner of the ox in question." There can be no doubt that, taken by itself, this part of the charge is wrong. It leaves out of view the *animus furandi*. To constitute *larceny*, the party committing the offense must have the view of converting the property to his own use permanently, or depriving the owner of his property permanently. The facts specified in the above charge require, in addition thereto, the felonious intent. Either Barnes or McDougal, of which Barnes had knowledge, must have intended to make this ox their property, or deprive the owner of the same permanently. It is true that in other parts of the charge the court sufficiently defines the crime of *larceny*, and specifies the necessary ingredients thereof. But

nowhere does the court call the attention of the jury to the specific facts set forth in the above charge, and make the necessary additions to constitute the crime of *larceny*.

The rest of the charge, save as to the verdict the jury might bring in, refers to the facts that appear against Paul and Barnes jointly. There was some evidence against Barnes that does not bear with equal force against Paul. While admitting that a charge to a jury should be taken together, and, if it states the law correctly, there is no error, I hold that, as to the facts specified in this part of the charge, the charge taken together does not state the law, and hence, that here was an error committed by the court.

The last point I shall consider is the refusal of the court to admit the testimony of the wife of Paul on behalf of Barnes. A wife, where her husband and another are jointly indicted, cannot testify on behalf of the other party, if her testimony would have a tendency to influence the case against her husband. The statute has not changed this rule. It appears that Paul and Barnes were tried together, and that the testimony of Mrs. Paul would contradict an important point in the evidence of McDougal, and tend to discredit the testimony he had given against her husband, Paul, as well as that against Barnes. I find no error in the exclusion of this evidence on the part of the court.

The judgment is reversed.

Judgment reversed.

COLLIER, respondent, v. FIELD, appellant.

CASE AFFIRMED. The case of *Collier v. Field*, ante, 205, is affirmed on rehearing.

PRACTICE — *appeal* — *subsequent order* — *statute construed*. On an appeal from an order made subsequent to the judgment, the court has power to reverse the judgment. A proper construction of section 378 of the Civil Practice Act gives the court such authority.

Appeal from First District, Jefferson County.

THIS was a rehearing of the case reported ante, 205.

JOHNSTON & TOOLE and M. C. PAGE, for appellant.

SHOBER & LOWRY and A. G. P. GEORGE, for respondent

KNOWLES, J. This case is presented to this court on a motion for a rehearing. When it was formerly before us, we only considered the right of the plaintiff to have a release, that he had executed to a certain judgment, set aside. We do not wish to recede from the opinion then expressed. Upon an examination of the decree entered by the court below, it may be that it does not bear the construction that the court below had found, that the release should be set aside as a mistake, and so adjudged, and that its proper construction is an adjudication that the plaintiff was entitled to recover, notwithstanding the release to Field. Considering it in this light, is the decree proper? It is claimed by appellants that the notes and mortgage sued upon in this case were merged in a judgment in a former case of *Collier v. Field*, and that, as far as the notes and mortgage are concerned, this case is *res adjudicata*. This was an issue, and the court below found adversely to the defendants upon it. I find no proper exception to this finding. The exception is as follows: "To the findings of the court herein, and each and every part thereof." This has been held by this and other courts, when a similar practice prevails, to be too general, if there is one good finding by the court. When an exception is made to a finding of fact, it should point out distinctly the objection. Civ. Pr. Act, § 229. Waiving the point that the exception was not properly taken, does the record show that the finding of the court upon this issue was error? The matters put in issue in this case were litigated in the other case of *Collier v. Field, Ervin and Metcalf*, in the district court, and a judgment entered therein; but in the record is a judgment of this court reversing that judgment. It is claimed this was a mistake, and that this court did not intend to reverse it. I should be inclined to think so. In terms, the judgment of this court is not a reversal of an order made subsequent to judgment, as is claimed, but a reversal of the judgment in the case. Appellants urge that under that appeal from an order made subsequent to final judgment, this court could not reverse the judgment. This is not clear, but I think under the provisions of our statute it could.

Section 378 of our Civil Practice Act is as follows: "Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties; and may set aside, or confirm, or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if necessary or proper, order a new trial."

It is as certain that this court has the power to grant a new trial upon an appeal from any order, as it has to grant a new trial on an appeal from a judgment. I can conceive of cases where it would be proper to order a new trial, on an appeal from an order made after final judgment. The reversal of a judgment of a court below is, in effect, the ordering of a new trial. The power to grant a new trial by implication grants the power to reverse a judgment. How could there be a new trial without a reversal of the judgment that had been entered in a case? This court had jurisdiction to do what it did do, and its judgment is not a nullity. The matters presented in this case were not *res adjudicata*.

The second point I shall notice is the release of Collier to Field. Although not properly presented in the pleadings, the issue was made on the trial, as to whether Ervin and Metcalf were present when the defendant Field was released, and consented thereto and agreed to be responsible for the balance due on said judgment.

The court finds directly upon this point, and in the decree is this finding: "The court finding from the proof that they (referring to Ervin and Metcalf) specially agreed to the said release, and to become and remain responsible for the amount remaining due on said notes and mortgage, after the payment and release set forth in said complaint and exhibits attached thereto."

In the findings of facts is the following:

"That, with the consent and agreement of all the parties hereto, except said Page, the defendant Field was released from all lien or liability in the premises, upon the payment of one-half of said indebtedness, which by him was done, and it was agreed that the same be credited upon said indebtedness, which, by mistake or inattention, was omitted."

There is another finding, to the effect that Page became a purchaser of an interest in the mortgaged property, with full knowledge of the above facts.

It must be considered that Ervin and Metcalf did consent to the release of Field, and agreed to be responsible upon the balance remaining due upon the judgment.

The defendant Page is not an innocent purchaser. What effect, under these facts, will this release have? Did the release of Field release Ervin and Metcalf?

Parsons, in his work on Contracts, vol. 1, p. 27, says: "Where a technical release, that is, a release under seal, is given to one of two joint debtors, and the other, being sued, pleads the joint indebtedness and the release, it is no answer to say that the release was made at the defendant's request, and in consideration that he thereupon promised to remain liable for the debt and unaffected by the release; for this would be a parol exception to a sealed instrument. * * * This being the reason, it should follow that only a release under seal should have the effect of excluding this answer. And the weight of authority is certainly and very greatly in favor of this limitation."

The release in this case was an instrument not under seal. The plaintiff might, as a defense, set up the fact to this release, when interposed by Ervin and Metcalf, that it was made by their consent and that they agreed to remain liable on the judgment, notwithstanding this release. The release of Field was a good consideration for such an agreement. The proof of this agreement between Collier, Metcalf and Ervin is not a variation of the written contract of release between Collier and Field. It is an additional agreement. Evidence of such an agreement is proper. 1 Greenl. on Ev., § 304. It has been held by many American authorities, that an agreement like the one under consideration would not be considered as a release of the obligation which all had entered into, but a covenant not to sue Field. An agreement not to sue does not discharge the obligation. 1 Pars. on Cont. 28. The release in this case was from a judgment, and not from the notes and mortgage. This judgment was, in fact, reversed. It is sought to make this release apply to the notes and mortgage. There is a doubt whether this can be done. The point was not

urged by respondents, and they have treated this release as though it did apply to the notes and mortgage. The complaint contains two causes of action — one to foreclose a mortgage to satisfy certain notes, and the other to reform or set aside this release. The defendants, as a defense to the cause of action to foreclose the mortgage, do not set forth in their answer this release. They deny the facts set forth by plaintiff, to secure a reformation or cancellation of this release. A release, to be available as a defense to an action for debt, should be affirmatively set forth in the answer. Van Santvoord's Pl. 506. If it should be contended that the facts found by the court, concerning the release, pertained to the second cause of action, the reformation or cancellation of the release, there was no issue presented as to a release of the notes and mortgage, and the only issue that was presented as to them was, as to whether they had been litigated and merged in the former judgment.

Rehearing denied.

TERRITORY OF MONTANA, respondent, v. STEARS, appellant.

CRIMINAL LAW — murder — degrees — indictment. The statutes of Montana (Cod. Sts. 273, § 21) make murder to consist of two degrees. The killing of a human being with malice aforethought, by means of poison, lying in wait, torture, or other willful, deliberate or premeditated means, or in the perpetration or the attempt to perpetrate arson, rape, robbery or burglary, is murder of the *first* degree. All other cases of killing with malice aforethought, express or implied, are murder of the *second* degree. The form of the indictment may be the same in both cases, and the *degree* of the offense is to be determined by the evidence of deliberation, premeditation, torture, etc.

SAME — verdict. The verdict of the jury alone, without reference to the indictment, judge's charge, or record of the evidence, must designate and express the degree of the offense, as well as the guilt. It is not enough to find one guilty as charged in the indictment, though the indictment may clearly charge the offense in the *first* degree. The jury alone must find the degree of the offense from the evidence, and designate it in their verdict. A failure to do so vitiates the verdict, and nullifies any judgment based thereon.

Appeal from Third District, Lewis and Clarke County.

STEARS was indicted at the March term, 1875, with Wheatley and another party, for the murder of Franz Warl. Wheatley and Stears were convicted, and Wheatley was hung June 29, 1875. Stears was again convicted at his second trial, and suffered death at the hands of the law.

J. J. WILLIAMS, for appellant.

J. K. TOOLE, District Attorney, Third District, for respondent.

WADE, C. J. The indictment in this case charges that the defendant, William H. Stears, on the 30th day of April, 1875, at the county of Lewis and Clarke, and Territory of Montana, "with force and arms, in and upon one Franz Warl, did make an assault, feloniously, willfully, and of his deliberate and premeditated malice, and of his malice aforethought, and that the said William H. Stears, with a certain leaden slung-shot, with which he, the said William H. Stears, was then and there armed, the said Franz Warl, in and upon the side and back of the head of the said Franz Warl, then and there feloniously, willfully, and of his deliberate and premeditated malice, and of his malice aforethought, did strike and bruise, giving to the said Franz Warl, then and there, with the leaden slung-shot aforesaid, in and upon the said back and side of the head of the said Franz Warl, one mortal wound, of which said mortal wound the said Franz Warl then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said William H. Stears the said Franz Warl then and there, in manner and form aforesaid, feloniously, willfully, and of his deliberate and premeditated malice, and of his malice aforethought, did kill and murder. contrary," etc.

Upon this indictment the defendant was tried, and the jury returned the following verdict: "We, the jury, find the defendant guilty, in manner and form as he stands charged in the indictment."

Judgment was entered upon the verdict without objection, and the defendant sentenced to be hanged by the neck until dead.

There were no exceptions taken at the trial, no motion for a

new trial or in arrest of judgment. The defendant, within three days of the time fixed for his execution, appeals to this court, and the question raised in the argument relates to the sufficiency of the verdict to support the judgment. The judgment rendered and sentence given were as upon a verdict of murder in the first degree. Does the verdict authorize the judgment and sentence?

Juries have been instructed in several murder cases in this Territory, that if they found the defendant guilty of murder in the first degree, to return such a verdict as was rendered in this case, and if the precedent is wrong, it cannot be corrected too soon.

1. The statute of the Territory requires that the jury before whom any person is indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder in the first degree or second degree. An analysis of the elements that compose the crime of murder in the first and second degree will show the reason of this requirement.

Under our statute murder is defined to be "the unlawful killing of a human being, with malice aforethought, either express or implied." Murder thus defined is divided into two degrees — the first degree and the second degree — but whether of the first or second degree, the killing must be unlawful, and attended with malice aforethought, either express or implied. Murder in the first degree is defined to be: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary." All other kinds of murder are declared to be murder in the second degree. If the killing was occasioned in the absence of deliberation and premeditation, but accompanied with malice aforethought, either express or implied, and not in the perpetration or attempt to perpetrate either of the crimes above named, or by lying in wait, torture, or poison, the same would be murder in the second degree.

Murder at common law is thus defined: "When a person of sound memory or discretion unlawfully killeth any reasonable creature in being and under the king's peace, with malice aforethought, either express or implied."

This is, in legal effect, the same as the general definition of

murder, under our statute, and having adopted the common-law description of the crime, it follows that an indictment for murder, good at common law, is good under the statute.

An indictment for murder at common law charged that the defendant "feloniously, willfully, and of his malice aforethought," did the act that caused the killing; and under such an indictment the defendant could be convicted of murder in the first or second degree.

Before a conviction of murder in the first degree could be had at common law, it was necessary, precisely as it is under our statute, that the element of settled *deliberation*, *premeditation*, *purpose* and *design* enter into the crime; that the murder should have been perpetrated by some kind of *deliberate* and *premeditated* killing, or by lying in wait, torture, poison, or in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, in which cases deliberation and premeditation were presumed; and before a conviction could be had of murder in the second degree it was necessary, as it is under our statute, to work out a conviction of murder in the second degree, that the murder be committed unlawfully and with malice aforethought, lacking the element of deliberation, which swells the killing to murder in the first degree; and a conviction for either of these degrees, as well for the first degree, the distinctive element of which is settled deliberation and premeditation, as the second degree, which lacks this element and is complete without it, could be had under an indictment charging the murder to have been committed *feloniously, willfully and with malice aforethought*.

Under an indictment charging the defendant with what constitutes murder in the second degree, and with that alone, a conviction could be had for murder in the first degree. If the defendant was charged with dealing a deadly blow, *feloniously, willfully and of his malice aforethought*, that produced death, which charge would amount to murder in the second degree, it might be shown under such indictment that the blow was given with a *deliberate* and *premeditated* design to kill, or that it was given while robbing or attempting to rob, etc., and death ensued, in which case the killing would be murder in the first degree, and a conviction could be had therefor. It need not appear on the face

of the indictment of what degree the murder was, because murder being charged the jury are, by their verdict, to ascertain the degree thereof. The crime of murder under the statute being charged, and the means by which it was accomplished being set forth, the proof may show the aggravating circumstances of premeditation and deliberation, or that the killing was effected in the commission, or in the attempt to commit, either of the four crimes above stated, by which the murder is swelled into that of the first degree, when that which amounts to the second degree is only charged, and hence the propriety of requiring the jury, in their verdict, to designate the degree.

This indictment against Stears will furnish an illustration. Read the charge against him and leave out the words "of his deliberate and premeditated malice," where they occur, which swells the charge to murder in the first degree, and the indictment would be good at common law and under our statute for murder, the elements of the crime being the same in both cases, and under it Stears might have been convicted of murder in the first degree. Under it it could have been shown that this blow with the slung-shot was given while robbing or attempting to rob Warl, or that it was given with a settled, premeditated design to kill him. In the absence of this proof, and with proof only of malice aforethought, either express or implied, the killing would have been murder in the second degree, but with such proof upon this charge the crime would have been augmented to that of murder in the first degree, and hence the necessity of the requirement that the jury designate the degree in their verdict.

In an indictment clearly and definitely charging the crime of murder under the statute, the averment of the words that swell the crime to that of murder in the first degree are mere surplusage, unnecessary, and need not be set forth. The degree of the crime is fixed by the proof, and the jury are to find it as a fact. The legislature, in adopting this statute, and enacting the common law upon the subject of murder, did not disturb any of the precedents of the common law. The decisions under the common law, upon the subject of murder, limit and control the effect of our statute on the same subject.

2. The jury should, in their verdict, designate the degree of

the crime upon a trial for murder, for the statute requires it, and this requirement cannot be dispensed with. What the jury mean by their verdict may not be doubtful, but no judgment can be entered thereon if this certainty is not apparent in the verdict. The statute says the jury shall "designate" in their verdict the degree of the crime. The word "designate" gives no license to go outside of the verdict to ascertain what is designated. It is the same as declaring that the jury shall express in language in their verdict the degree.

For another reason the verdict is rendered uncertain and insufficient. Under an indictment charging the defendant with murder in the first degree, a conviction can be had for murder in the second degree, or for manslaughter. Under such an indictment, it might with propriety be said that he was charged with murder in the second degree, and manslaughter, as well as murder in the first degree. Such an indictment would support a conviction for either of the lower grades of the crime, and a conviction in the manner and form as charged might be for either of the three offenses.

There are many decisions upon the question, and it will be seen that verdicts in the precise words of the one in question have been rendered, upon which judgments have been entered and reversed because of the uncertainty of the verdict.

In 1794, Pennsylvania enacted a statute defining the degrees of murder, and requiring the jury, in their verdict, to ascertain the degree of the crime. This may be called, as it is in fact, the parent statute, and from it has sprung a brood of statutes—its children—and ours is one of its offspring; and if we adhered to the counsels of the parent, we could hold this verdict good, as will be seen by an examination of the cases of *White v. Commonwealth*, 6 Binn. 179; *Commonwealth v. Flanagan*, 7 Watts & S. 415; *Commonwealth v. Miller*, Lewis' Crim. Law, 398; *Commonwealth v. Earle*, 1 Whart. 525; *Johnson v. Commonwealth*, 12 Harris, 386.

But the weight of authority is against the verdict, as the following authorities will show:

In *People v. Marquis*, 15 Cal. 38, the defendant was convicted of the crime of murder under an indictment in the usual form. The verdict of the jury was "guilty, as charged in the indictment."

ment." The court, in reversing the judgment, say: "The indictment was as good for murder in the second degree as in the first degree, and the jury, under this indictment * * *, might have found the defendant guilty of the second as well as they could have found him guilty of the first degree of that crime. The statute provides that the jury shall designate in their verdict the degree of the offense. This they have not done, and the court, in a capital case, cannot assume that they designed, from a general finding, to fix the grade of the crime."

The question again came before the supreme court of California in *People v. Campbell*, 40 Cal. 129, notwithstanding the earlier decision upon the same subject, and the court held, that in a trial for murder, if the jury find the defendant guilty, they must expressly state in their verdict the degree of murder. Notwithstanding the crime charged in the indictment may be murder in the first degree, a verdict, that the jury find the defendant guilty of the crime charged in the indictment, is not such a designation of the degree of murder as the statute requires. Therefore the judgment was reversed. Our statute is a re-enactment of that of California, and the construction put upon it by the California courts might be said to be enacted with the statute. But other States, with statutes springing from the same source, furnish precedents of like authority.

In *State v. Moran*, 7 Iowa, 236, the indictment charged that the defendant did, "with force and arms, willfully, deliberately, and with malice aforethought, kill and murder Mrs. Moran with a knife, by stabbing," etc. The charge was in language similar to that in the indictment in the case at bar. The jury returned a verdict in these words: "We, the jury, find the defendant guilty, as charged in the indictment."

After reciting the statute which, like ours, requires the jury to ascertain by their verdict the degree of the murder, the court say: "We think the jury cannot be said to have made this inquiry, nor to have ascertained by their verdict the degree of the defendant's guilt. This it was their province and their duty to do, and the court had not the right to assume, from the verdict rendered, that they intended to find the prisoner guilty of one rather than the other offense. It is said, however, that the indictment charges

the crime of murder in the first degree, and that when the jury, by their verdict, found the defendant 'guilty, as charged in the indictment,' they did, in legal effect, ascertain that he was guilty in the degree charged. This argument, however, leaves it to the court to deduce the intention of the jury from a verdict general in its language, whereas the law requires that the *jury* shall find specifically the *fact* whether guilt is of the first or second degree. When jurors find by their verdict that a prisoner is 'guilty,' or, 'guilty, as charged in the indictment,' it is not assuming too much to say, that as a general thing, they have simply found him guilty of a criminal homicide, without reference to the degrees of his guilt. And to say that upon such a verdict the court might properly conclude that they intended the highest offense, would be to presume against instead of in favor of human life."

To the same effect are the following cases: *Dick v. State*, 3 Ohio St. 89; *Parks v. State*, id. 101; *State v. Dowd*, 19 Conn. 388; *Thomas v. State*, 5 How. (Miss.) 20; *State v. Reddick*, 7 Kan. 143; *McPherson v. State*, 9 Yerg. 279; *Kirby v. State*, 7 id. 259; *Hines v. State*, 8 Humph. 579; *Mitchell v. State*, 8 Yerg. 574; *Commonwealth v. Miller*, 1 Va. Cases, 310, 311; *Wicks v. Commonwealth*, 2 id. 387; *Livingston v. Commonwealth*, 14 Gratt. 592, 596; *Cobia v. State*, 16 Ala. 781; *Johnson v. State*, 17 id. 618; *Noles v. State*, 24 id. 672; *Harsell v. State*, 26 id. 52; *McGee v. State*, 8 Mo. 495; *People v. Potter*, 5 Mich. 1; *Thomas v. State*, 5 Miss. 32; *Slaughter v. State*, 24 Tex. 410.

The above decisions have been made under statutes similar to that of this Territory, under consideration by the courts of Ohio, Connecticut, Mississippi, Kansas, Tennessee, Virginia, Alabama, Missouri, Michigan, Texas, California, Iowa and Pennsylvania.

The conclusion is certain, that the verdict in the case of murder must express the degree of the crime, or no judgment can be entered thereon. A verdict of "guilty, in manner and form as charged in the indictment," when the indictment charges murder in the first degree, cannot, by the aid of evidence, instructions, or any presumption, be made to comply with the statute.

The judgment is reversed, and cause remanded for a new trial

Judgment reversed.

SMITH, respondent, v. LOVELL, appellant.

LIABILITY OF SURETIES — official bond — probate judge — breach of conditions.

The failure of the probate judge to make the proper order on the final report of the administrator, and instead thereof, ordering said administrator to pay over the moneys belonging to the estate into the hands of the probate judge, is such a breach of the condition of the official bond, guaranteeing "a faithful performance of official duties," as to sustain an action by the lawful heirs against the sureties of the probate judge. Failure to do what the law requires, as well as doing what the law does not allow, is a breach of the bond.

PROBATE JUDGE — attorney. The probate judge cannot act as attorney in his own court.

Appeal from First District, Madison County.

J. G. SPRATT, for appellant.

S. WORD, for respondent.

WADE, C. J. The question in this case relates to the liability of sureties upon the official bond of a probate judge. The administrator of the estate of A. F. Smith, deceased, rendered his final account to one of the appellants, Lovell, probate judge of Madison county, showing \$529.83 in his hands, for distribution to the heirs. The probate judge then entered an order on the journal of his court, requiring the administrator to pay the money to him, the probate judge. The money was paid according to this order. The heirs of the decedent have demanded the money of the probate judge, who fails to pay it, and bring this action against the sureties on his bond, to compel the payment to them of this money so paid by the administrator.

The liability of the sureties depends upon the construction of the condition of the bond of the probate judge, and the statutes defining the duties of this officer, upon the rendition of the final account of an administrator, with money in his hands for distribution. This condition is as follows: "That, whereas, the above-bounden William Y. Lovell was duly elected to the office of probate judge of Madison county, on the 2d day of August, 1869: Now, therefore, if the said William Y. Lovell shall faithfully

perform all the duties of his said office, and shall pay over all moneys that may come into his hands, as such probate judge, as required by law," etc. The statute referred to is as follows: "If it appear, upon final settlement, that the legatee or the distributee is a non-resident of this Territory, or from any other cause is not in a situation to receive his share, and give a discharge therefor, or does not appear by himself or authorized agent to receive the same, the probate court shall order the executor or administrator to lend out the money on good security, for such limited time as the court may direct, not exceeding one year." (Cod. Sts. 360, § 246.

Sureties have the right to rely upon the letter of their undertakings, and their liability cannot be extended by implication. A public officer's sureties are only responsible for the duties assigned such officer by the law. Where the law defines the duties of a public officer, his sureties are responsible for the faithful performance of such duties, and are not responsible for acts which do not pertain to his office. These sureties, standing upon these principles, say that the order of the judge requiring the administrator to pay this money to himself was an order not enjoined by the statute, and therefore void, and that the payment of the money, by the administrator to the judge, was an act not required by the statute and in violation of it, and therefore they are discharged.

If the law requires an officer to pay to his successor the moneys received by virtue of his office, and instead of doing this he purchased for himself a residence with the money, and was thereby a defaulter in his office, his sureties might say they would not be liable, for they can only be held responsible for a faithful performance of the duties which the law enjoins upon the officer; and the officer having disposed of the money as the law did *not* require, they are discharged. If this was the rule sureties upon official bonds would never be held responsible. If the money was paid as the law enjoins they would not be liable, and if paid as the law did *not* enjoin they would also be discharged.

This doctrine cannot be maintained on principle or authority. The sureties undertook and promised that the officer "should faithfully perform the duties of his office." If he fails to do the act required by law by refusing to take any action, or doing an

act the law does not require, and forbids, there is a breach of the undertaking of the sureties, and a liability on the bond. What is the faithful performance of official duty? It is to do acts and make orders according to law. If the officer departs from the direction of the law and does an unlawful act, there is an unfaithful performance of official duty, and a violation of the promise of the sureties that the official duty shall be faithfully performed. The omission to do an act required by law does not affect the liability arising from the omission to do the act enjoined by law.

It is insisted that the receipt of the money by the probate judge was a violation of law: that the order directing its payment to himself was a nullity, and that the sureties are not liable. The payment was a violation of law and the order was a nullity, but he failed to make the proper order and failed to perform faithfully the duties of his office, and fixed the liability of his sureties. When the administrator rendered his final account the statute required the probate judge to order the money to be invested. Cod. Sts. 360, § 246.

But the probate judge, in gross violation of his duties, orders the money paid to himself and refused to pay it over upon demand, upon the specious plea that he received the money as the attorney of the heirs.

The statute prohibits the probate judge from receiving money in this manner by requiring him to order the administrator to invest it. The probate judge cannot act as attorney for parties in his court. As well might he undertake to render judgments in favor of himself.

It would be a convenient contrivance if a probate judge could as judge order money paid to himself, and the moment he received it become an attorney and thereby escape all liability upon his bond. These sureties, in effect, promised when this administrator rendered his final account, showing money in his hands for distribution to the heirs, that the probate judge would order such administrator to invest the same, as the statute requires. The liability of the sureties is the same as if this promise had been written in the bond. And it is a breach of the condition of the bond for the judge to fail to make such order and order the money to be paid to himself.

The judgment below is affirmed.

Judgment affirmed.

COLLIER, respondent, v. ERVIN, appellant.

PRACTICE — *demurrer — complaint — several causes.* When the demurrer is to the whole of the complaint, containing several causes of action, and either one is sufficient, it fails.

SAME — *improper joinder — ground of demurrer specified.* Any demurrer to complaint, except for want of cause of action, and of jurisdiction, as if for improper joinder of action, should specifically point out the defect, or it will be disregarded. The mere language of the statute in such case is insufficient for the purpose.

SAME — *exceptions — findings of court — if of fact must be specific.* A general exception to the findings of the court is insufficient. If to findings of fact, it should specifically point out wherein the finding was erroneous.

DECREE — *errors of law — several foreclosures sought — amount due on each — priority — sale of property.* Errors of law need not be set forth as specifically as those of fact. When the foreclosure of several mortgages is sought, and embraced in a single action, the decree should find the amount due on each, the priority or order in which each is to be paid, and only such property as is embraced in a particular mortgage should be sold to satisfy the debt secured thereby.

MORTGAGE — *indemnity — basis of action.* In foreclosing a mortgage given to indemnify sureties on notes, for moneys paid by such sureties, the notes themselves should not be made the basis of the action, but money paid for the use of the makers of the notes.

Appeal from First District, Jefferson County.

THIS action was based upon the same instruments and indebtedness as the case of *Rader v. Ervin*, 1 Mon. 632.

CHUMASERO & CHADWICK and M. C. PAGE, for appellant.

SHOBER & LOWRY and A. G. P. GEORGE, for respondent.

KNOWLES, J. The bill of exceptions in this case shows that the appellants excepted to the ruling of the court in overruling their motion to strike out amendment to complaint, and motion to strike out complaint as amended. No point is made upon this exception in appellants' brief, and hence it will not be considered. The third exception of appellants is the overruling of their demurrer to the complaint. The first ground of demurrer set forth is,

That the complaint does not state facts sufficient to constitute a cause of action. This demurrer is to the whole complaint, and not to any separate cause therein set forth. If there is one good cause of action set forth in the complaint, then the ruling of the court was correct. Upon a careful examination I am satisfied that the complaint contains at least two good causes of action. The second ground of demurrer is, the court has no jurisdiction of the subject of the action. I do not understand how such an objection can be urged. The complaint sets forth at least two good causes of action for the foreclosure of a mortgage upon property within the jurisdiction of the court. The third ground is, that several causes of action have been improperly united. There is no further specification under this head. All grounds of demurrer, save those above specified, namely, want of a cause of action, and want of jurisdiction, should specifically point in what the defect consists. The language of the statute will not be sufficient for this purpose. This ground of demurrer, failing to specify the defect as required, should be disregarded. There was no error in the court overruling this demurrer. The next point presented is the exception to the findings of the court. The exception is in this language simply: "To the findings of the court." This exception would include all of the said findings. If one of the findings is correct, the exception is too general. One of the findings both parties agree is correct. It may be also observed that an exception to a finding of fact should point out specifically wherein the finding is erroneous. This exception has no pretensions of this kind. The fifth exception is to the decree, and is in this language: "To the decree herein, and each and every part thereof." An appellant need not be so specific in pointing out an error of law as one of fact. *Solomon v. Reese*, 34 Cal. 28. The appellant in his brief points out in what the defect in the judgment consists. It is that the amount secured by the Rader mortgage is embraced in the decree, when it was found by the court that said mortgage was insufficient in law. Both parties seem to have been satisfied with this finding. The causes of action set forth, and attempted to be set forth in the complaint, are each for the foreclosure of a distinct and separate mortgage. The findings there that the mortgage sought to be foreclosed in

one cause of action was insufficient in law, disposed of that cause. No recovery could be had upon it. But respondents claim that the amount secured by that mortgage was also secured by the Blacker mortgage! It is true that this mortgage was given to indemnify Blacker. Should he be compelled to pay the notes set forth in the Rader mortgage? Rader and Blacker were both bound in certain notes with Ervin and Metcalf. The Rader mortgage was executed to him by Ervin and Metcalf to indemnify them should he be compelled to pay their notes. The Blacker mortgage was executed to him by these parties to indemnify him should he be compelled to pay these notes, and one other note payable to W. B. Howard for \$1,000. But the cause of action which seeks to foreclose the Blacker mortgage does not set forth that Blacker ever paid the notes described in the Rader mortgage. In the cause of action in which it is sought to foreclose the Rader mortgage it is specifically alleged that Rader paid their notes. It cannot be maintained that, when a mortgage is given to indemnify a party against the payment of several distinct notes, and he is compelled to pay but one of them, he can foreclose his mortgage to satisfy the amount of all the notes. Yet this is what is sought to be accomplished in this decree. The third cause of action is for the foreclosure of a mortgage executed to Collier to secure the payment of a note executed to him for \$800. The court below, in the decree, made this finding: "That the mortgage of March 15th, A. D. 1869, to the plaintiff to secure the payment of \$800, as well as the Blacker mortgage, is sufficient in law to entitle the plaintiff to a foreclosure thereof for the amounts due upon the several notes in said complaint described, after deducting the payment thereon, as therein set forth," etc. This is nothing more than a finding of a conclusion of law, and it is erroneous. These two mortgages, under the facts set forth in the complaint, are not sufficient to warrant a foreclosure for the amounts paid in the notes described in the Rader mortgage. The amount paid by Rader in these notes is embraced in the decree herein. The decree is, therefore, erroneous. The decree is also irregular. A similar decree was considered by this court in the case of *Rader v. Ervin*, 1 Mon. 632, and so pronounced. While it may be proper under our Code practice, for a party to unite

in the same complaint distinct causes of action seeking to foreclose several mortgages, a proposition which it is not now necessary for this court to determine, still, in any view of the case, the decree should find the amount due on each mortgage, the priority of each, and if they do not cover the same property, then the decree should be so drawn as not to authorize the sale of property not embraced in a mortgage to satisfy it. It is probably true that all of the property described in the Collier mortgage is embraced in the Blacker mortgage; but all of the property described in the Blacker mortgage is not embraced in the Collier mortgage. It was not proper then that all of the property described in the Blacker mortgage should be ordered sold to satisfy the Collier mortgage. The decree does not determine the priority of these mortgages. While this case presents some unusual complications, a decree can undoubtedly be entered that will preserve the rights of all parties. Again, in the decree, the court seems to base its findings upon the supposition that the several actions are based upon promissory notes. This is true only of the last cause of action. The first and second causes of action should be based upon the fact that the notes set forth therein had been paid by either Rader or Blacker, and that Ervin and Metcalf were bound to contribute to these parties for money paid and expended for their use.

For the reasons above, this decree is reversed, and the cause remanded for further proceedings.

Decree reversed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1876, HELD IN HELENA.

Present :

HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } ASSOCIATE JUSTICES.
HON. HENRY N. BLAKE. }

HOWARD, appellant, *v.* QUINN, respondent.

PAPERS — *considered on appeal.* This court will not review papers in the transcript, which were not used on the hearing in the court below, or have not been certified properly by the clerk of the district court.

JURISDICTION — *appeal from probate court.* The district court cannot acquire jurisdiction of an action that has been appealed from the probate court, unless all the papers belonging thereto and a transcript of all the proceedings in the probate court are transmitted to the clerk of the district court.

Appeal from First District, Jefferson County.

M. C. PAGE, for the motion to strike out papers.

S. ORR, contra.

BLAKE, J. The appellant commenced two actions against Ervin and others in the probate court of Jefferson county, to recover the value of certain gold dust, and filed affidavits and undertakings for the attachment of the property of the defendants. Writs of attachment were served upon the respondents, who made verbal answers to the sheriff respecting the credits and personal property in their possession belonging to the defendants. The appellant obtained judgments in the suits, and the respondents were examined by the court concerning the credits and property, and "discharged from liability as garnishees." The district court dismissed the appeal, which was taken from this order, and the appellant appealed to this court. The case is before us upon the motion of the respondents to strike from the transcript the complaints and affidavits and undertakings for attachments.

The transcript contains the following certificate: "I, W. L. Hall, clerk of the district court, do hereby certify that the foregoing is a true and correct transcript of the papers, orders, etc., that it purports to be. I further certify that among the papers herein copied the following are not among the records of my office, being held and retained by the probate judge of said county, to wit: The complaints, affidavits and bonds for attachments."

The three hundred and seventy-ninth section of the Civil Practice Act provides that "on appeal from a judgment rendered on an appeal, or from an order, the appellant shall furnish the court with * * * a copy of the papers used on the hearing in the court below." It does not appear that the papers described in the motion were used on the hearing in the district court. This court will not reverse the decision of the court below by reason of any matter of fact that was not shown or offered there. *Wallace v. Eldredge*, 27 Cal. 498.

The complaints, affidavits and undertakings, which have been copied into the transcript by the clerk of the court below, are not properly certified and cannot be considered by us. *Gordon v. Clark*, 22 Cal. 533; *Stone v. Stone*, 17 id. 513. The motion must be sustained.

The case was then heard on its merits. The appeal from the probate court was dismissed by WADE, J.

S. ORR and JOHNSTON & TOOLE, for appellant.

The appeal from the probate court was proper. Civ. Pr. Act, § 409. The court below had jurisdiction of the garnishees from the time the service was made on them by the sheriff. Id., § 145.

This is an action between appellant and the garnishees, and an appeal is proper. *Drake on Attach.*, § 452; *Norris v. Burgoyne*, 4 Cal. 409; *Smith v. Brown*, 5 id. 118; *McCullough v. Clark*, 41 id. 298; *Hovey v. Crane*, 12 Pick. 167; *Folsom v. Haskell*, 11 Cush. 470; *Oliver v. Chicago & A. R. Co.*, 17 Ill. 587; *Crane v. Shaw*, 13 Mass. 215; *Porter v. Stevens*, 9 Cush. 535.

The notice of appeal and undertaking were given according to the statute, and the appeal was duly perfected. Civ. Pr. Act, §§ 409-415. There should have been a trial *de novo*. Id., § 418.

The service of the garnishment and answers of the garnishees constituted the action appealed from. No other pleadings are needed. The defendants had no interest in the proceedings after judgment against them and cannot be proper parties to this appeal.

M. C. PAGE, for respondent.

The district court never acquired jurisdiction of this proceeding. Our statute only allows an appeal from a judgment of the probate court, not from orders.

The records have not been transmitted to the probate court, as required by law. Civ. Pr. Act, § 415. Any garnishment under attachment is a part of the records. *Drake on Attach.*, § 658 *a*.

Appellant took no measures to have the proper record filed, and the court below was compelled to dismiss the appeal from the probate court.

BLAKE, J. Some of the facts appearing in the transcript are stated in the opinion of the court upon the motion of the respondents. An appeal has been taken from an order of the probate court discharging the respondents from liability as garnishees. The defendants in the original actions are not interested in this proceeding, and are not named as the parties thereto, and it is evident that the cases in the district court are not the same as those which were commenced in the probate court. The parties

and subjects of controversy are not identical. We refrain from deciding that the district court can acquire jurisdiction of this proceeding, which cannot affect the original suits.

But, assuming that the appeal has been taken in a civil case and is properly before us, we are satisfied that the appellant has not complied with the statute governing appeals from the probate court. The order of the probate court, which was appealed from, was made March 3, 1874; the notice of appeal was filed March 12, 1874, and the undertaking on appeal was approved and filed March 14, 1874. The following papers were filed in the district court September 29, 1874: The affidavit of appellant relating to the answers of the respondents as garnishees, the citation of the probate court, and the notice and undertaking on appeal. The respondents filed a motion to dismiss the appeal October 6, 1874, and the district court granted the same October 8, 1874.

All appeals from the probate to the district court must be perfected within thirty days from the rendition of the judgment appealed from. Civ. Pr. Act, § 410. Within ten days after the notice and undertaking on appeal have been filed, the probate judge or clerk "shall make a full and complete transcript from the docket of all proceedings had in said action, and transmit the same, together with the complaint, answer, motions, pleadings, and all other papers pertaining to or belonging to said cause, to the clerk of said district court." Id., § 415. The object and importance of these requirements are obvious when we examine section 418, which provides that "all appeals taken by virtue of this act shall be tried in the district court upon the papers in the cause, as if the same had originally been instituted in said court." After the respondents made their motion to dismiss the appeal in the court below, the appellant did not suggest that the record was incomplete, and made no effort to perfect his appeal by filing any papers. The district court did not have jurisdiction of the proceeding, and dismissed the appeal.

Judgment affirmed.

ALLPORT, appellant, v. KELLEY, respondent.

APPEAL FROM "JUDGMENTS" AND ORDERS — *review of evidence*. At the April term, 1875, A. recovered a judgment against K. for \$1, and K. recovered a judgment against A. for the costs. A.'s motion for a new trial was refused May 10, 1875. A. filed his notice of appeal July 5, 1875, and appealed from the "judgments" rendered in the action at said term. A. did not appeal from the order refusing the motion for a new trial. *Held*, that the appeal from the "judgments" does not embrace an appeal from the order refusing the new trial. *Held*, also, that this court cannot review any question of fact when there is no appeal from an order granting or refusing a new trial.

PRACTICE — *denial — agreement of counsel*. An agreement in open court that a cause pending shall be tried on the general denial in the answer to every material allegation in the complaint, precludes a party from objecting to the sufficiency of such denial and the introduction of testimony thereunder. If such denial was deemed insufficient it was the duty of counsel to have demurred thereto. If the answer was defective it was cured by the agreement.

MEASURE OF DAMAGES — *injunction — undertaking — attorney fees*. In a suit on an undertaking given to procure a temporary injunction, the merits of which were never tried, no recovery could be had for attorney fees expended in the main suit to determine the title to the waters in dispute, and evidence offered for such purpose was properly excluded. The case of *Campbell v. Metcalf*, 1 Mon. 381, affirmed and applied.

Appeal from Second District, Deer Lodge County.

J. C. ROBINSON, for appellant.

CLAGETT & DIXON, for respondents.

The case was heard upon certain objections to the assignment of errors.

BLAKE, J. This case is before us upon the objections of the respondents to the right of the appellant to be heard on any errors assigned in the transcript, on the ground that the evidence is insufficient to support the findings of facts by the court below. The cause was tried by the court without a jury, and two judgments were rendered, April 22, 1875. The appellant recovered \$1 as

damages, and the costs of the action were taxed against him. The appellant filed specifications of the grounds of his motion for a new trial April 27, 1875. On May 10, 1875, the motion was heard and refused, and the appellant filed his statement on appeal May 26, 1875. The notice of appeal was filed July 5, 1875, and states that the appellant "appeals from the judgments rendered in said cause at the April term of said court, 1875, to the supreme court" of this Territory. There is no statement or bill of exceptions containing the evidence on the motion for a new trial, and no appeal has been taken from the order refusing the motion for a new trial.

The appellant contends that the order of the court refusing his motion for a new trial is a judgment, and can be reviewed by this court under his appeal from the judgments rendered at the April term, 1875. The statutes define with certainty the terms "order" and "judgment," and point out the distinction between them. "A judgment is the final determination of the rights of the parties in the action or proceedings." Civ. Pr. Act, § 180. Section 380 of the Civil Practice Act provides that "an appeal may be taken to the supreme court from the district courts in the following cases: First. From a final judgment entered in an action or special proceeding. * * * * Second. From an order granting or refusing a new trial." Section 369 says that an appeal may be taken from a "final judgment" within one year after its rendition, and from "an order granting or refusing a new trial," within sixty days after the same is made and entered in the minutes of the court. If the views of the appellant are sound, a party who appeals from a judgment nearly but within a year after its rendition, thereby appeals from an order granting or refusing a new trial, although the statute requires the appeal to be taken from the order within sixty days after the same has been made and entered. An appeal from the judgments rendered in the court below does not authorize us to review the order refusing a new trial.

This court cannot review any question of fact if there is no appeal from an order granting or refusing a motion for a new trial. *Harris v. S. F. S. R. Co.*, 41 Cal. 393. The courts of California have decided, under the same provision of the Civil Practice Act,

that a statement on appeal "is intended solely for the purpose of bringing up alleged errors of law." The facts stated in the findings of the court must be regarded as true, and we cannot consider on this appeal the insufficiency of the evidence to support the findings. *Rycraft v. Rycraft*, 42 Cal. 444; *Stockton v. Creanor*, 45 id. 247; *Gates v. Salmon*, 46 id. 361.

The case was then heard on its merits.

WADE, C. J. This action was brought, upon an undertaking executed by these defendants to the plaintiff, to procure a temporary restraining order in the case of *Stewart et al.* against him which was an action to have adjudicated the title and the right to the use and possession of certain waters of Peterson creek, Deer Lodge county, and for a perpetual injunction to enjoin Allport, this plaintiff, from the use or diversion thereof. There was a trial of the case to a jury, and verdict and judgment in favor of Allport, and a dissolution of the restraining order. Hence the present action.

The answer contains specific denials of certain averments of the complaint, then a general denial of every material allegation not specifically denied, and certain new matter. There was a motion to strike out the new matter in the answer, and also a motion to compel the defendants to elect whether they would rely upon the specific denials or the general denial. Then the following agreement was made, in open court, between the counsel of the plaintiff and defendants, and entered upon the records thereof and made a part of the transcript:

"By agreement of counsel, in open court, the former order herein, that the cause should be tried upon the specific denials in defendants' answer, is set aside, and it is agreed that the cause shall be tried upon the general denial in said answer, and the specific denials therein be stricken out."

On the trial the plaintiff objected to the sufficiency of the general denial, and to the introduction of any evidence thereunder, upon the ground that such denial did not put in issue any matter contained in the complaint. This objection was overruled, and this action of the court is one of the errors complained of by the appellant.

The objection was properly overruled. If there was any defect in the form of the denial, it was a technical one, and should have been taken advantage of by demurrer for uncertainty. But however objectionable the answer might have been, its defects were cured and waived by the agreement that the cause be tried upon such answer. It often occurs that a case is tried in the absence of some formal averment in the pleadings necessary to form an issue, upon stipulation between the parties in open court, that such averment may be supplied during or after the trial, and after such stipulation it is too late to object to the pleadings, because of such formal defect. And so in this case, after the agreement had been made and acted on by respondents, it was too late for the appellant to object to the sufficiency of the answer. Such agreement is a waiver of the objection.

The second question presented relates to the measure of damages upon the undertaking sued on. Does it extend to the recovery of attorney's fees, in defending the action before a jury upon its final trial? The restraining order was issued upon the condition that this undertaking be given. What were the liabilities created thereby? Security for such damages as the defendant in that action might sustain, by reason of the order, if the same was wrongfully obtained. The plaintiff here never saw fit to test the question, as to the propriety of issuing the order. He did not attempt to procure its dissolution, but suffered the same to remain in force until the cause was tried, upon its merits, in court, when there was a judgment for defendant, and, as a necessary consequence, the restraining order was dissolved.

On the trial the plaintiff offered to prove, as a part of the damages contemplated in and secured by the undertaking, the necessary attorney's fees in defending the action upon its final trial before a jury, which testimony was excluded. An examination of the issues in that case will show that the object and purpose of the action were to ascertain whether the plaintiff or defendants were entitled to the ownership of the waters in question. The issue was one of title and the right of possession, and the purpose of the trial was to determine and adjudicate the right and the title, and was not for the dissolution of the restraining order.

The proper place to have tried the propriety of that order was

before the judge or court, and not before a jury. But the defendant never asked to have the order dissolved, and permitted it to remain in force until it fell and became inoperative, by virtue of the trial before the jury. No attorney's fees were ever incurred or paid, to procure a dissolution of the order. Indeed, the defendant agreed to the issuance of the order, and never asked for its dissolution until it became inoperative, by virtue of the judgment in the main case.

The sureties upon the undertaking did not promise directly or indirectly, or by any torture of language, to pay the necessary costs and expenses of determining the title to the waters in question, or the propriety of a perpetual injunction. They simply promised to pay the damages resulting to the defendant, by reason of the restraining order, if it should be determined that the plaintiffs were not entitled thereto. No such determination was ever had, no attorney's fees were ever expended in that behalf, the order was acquiesced in without complaint until it became inoperative by the adjudication of other questions and other issues.

This court has already decided the question here presented, in the case of *Campbell v. Metcalf*, 1 Mon. 381, and we see no reason for reversing or modifying that decision.

In that case the court says: "The attorney fees and expenses in the action between respondents and Rankin, in determining the title to mining ground, were not properly chargeable as damages for the dissolution of the injunction. If any portion of these attorney fees and expenses were paid for that purpose, it devolved upon respondent to show what portion. As they failed to do this, the jury were not warranted in finding any damages on account of them."

Judgment affirmed.

SMITH, appellant, v. AUERBACH, respondent.

PRACTICE — pleadings — bankrupt law. An allegation that a mortgage is void under the bankrupt law is not sufficiently explicit without setting out the clause of the law under which the claim is made and the necessary facts to justify the introduction of evidence.

SAME — pleadings — statute of frauds. If a chattel mortgage is claimed to be void under the statute of frauds, the facts to authorize such proof must be specially pleaded. A mortgage is not void under this statute because given for a pre-existing debt, or for double the amount due; there must be the further allegation that it was done to hinder, delay, or defraud creditors. Taking possession of goods under a chattel mortgage is not wrongful, unless the instrument be shown to have been fraudulent, and the pleadings must contain the proper averments to allow such showing.

Appeal from Second District, Deer Lodge County.

J. C. ROBINSON and CHUMASERO & CHADWICK, for appellant.

JOHNSTON & TOOLE, for respondent.

KNOWLES, J. The plaintiff is an assignee in bankruptcy of the estate of Louis and Coleman, bankrupts. The defendants took the goods in dispute by virtue of a chattel mortgage executed to them by said Louis and Coleman. The inference from the pleadings is, that the defendants, by the terms of their chattel mortgage, had the right to the possession of these goods at the time they took possession of the same. Among other issues, the plaintiff, in his complaint in this case, maintains that the mortgage was void, having been made in violation of the bankrupt act, and that, as to creditors, it was void under the statute of frauds, or void in fact. This brings to our consideration the point as to whether plaintiff could prove these issues under the pleadings in the case. The complaint sets forth that this mortgage was in violation of the bankrupt act, but does not show wherein said mortgage was executed in violation of that act. There are no allegations that the said Louis and Coleman were insolvent at the date of the execution of this mortgage; or whether the defendants had reasonable cause for believing that they were insolvent;

or whether the date of the execution of the mortgage was six or four months before the adjudication in bankruptcy of said Louis and Coleman. These facts ought to be specifically pleaded to allow a party to introduce proof thereof. A simple allegation that a mortgage is void under the bankrupt law will not be specific enough. The pleading should set forth under which clause of the bankrupt law a mortgage is void, and should state the necessary facts.

But the evidence that was admitted to show that this mortgage was void under the bankrupt law made out a case for the defendants. The complaint does not set forth sufficient facts to show that the mortgage was void under the statute of frauds of this Territory, or for fraud in fact. There is an allegation that the mortgage was given for a pre-existing debt, and that the amount for which said mortgage was given was double the amount of this debt. But this could not make the mortgage void under the statute of frauds. There are no allegations that the same was made to hinder, delay or defraud creditors, or any thing of that nature. Where fraud is a necessary part of a plaintiff's or defendant's case, the facts constituting the fraud should be set forth so that the opposite party may know what he has to meet. *Van Santvoord's Plead.* 466-468; *Everston v. Miles*, 6 Johns. 138.

I am aware that the case may be so presented that the question of fraud would arise on the trial, but in this case the fact that the defendants took possession of these goods under their chattel mortgage, is specifically averred in the complaint and admitted in the answer. Hence, it devolved upon the plaintiff to show that this taking was wrongful, and show some facts from which the jury could have found that this mortgage was fraudulent. And to show this, it was necessary that the plaintiff should have made the proper averments. It may be true that the issues presented in the pleadings in this case are not presented as they should be, that this issue of fraud should have been raised by the replication; but we must consider the issues as we find them presented. As there were no issues that showed that the mortgage was void under the bankrupt law, and no evidence to that effect, and no facts set forth to show that it was void for fraud, under which evidence to that effect could be admitted, the court below properly

granted a nonsuit in this case. The other errors were waived, if there ever was any validity to them, by the plaintiff's replying to defendants' answer and proceeding to the trial of the cause.

Judgment affirmed.

ORR, appellant, v. HASKELL, respondent.

CASE AFFIRMED. The case of *Rader v. Nottingham*, ante, 157, holding that an order of the district court overruling a motion to re-tax costs is not appealable, affirmed.

APPEAL FROM ORDER QUASHING EXECUTION. An appeal can be taken to this court from an order overruling a motion to quash an execution.

COSTS—*blank for, in judgment—power of clerk.* In this action a judgment was entered against O. for the costs in March, 1872, and the blank left in the judgment for the amount thereof was filled by the clerk of the district court in March, 1875. A memorandum of the costs for \$115 was filed in March, 1872, and the sum of \$208 was inserted in the blank in March, 1875. *Held*, that the clerk is a ministerial officer and must fill said blank within two days, or a reasonable time after the costs have been ascertained. *Held*, also, that the voluntary act of the clerk in filling said blank is void. *Held*, also, that the fees of the clerk and sheriff should be included in said memorandum by the party claiming them. *Held*, also, that costs can only be recovered by a strict compliance with the Civil Practice Act.

Appeal from Third District, Lewis and Clarke County.

W. E. CULLEN, for the motion to dismiss the appeal.

S. ORR, contra.

BLAKE, J. The respondents move to dismiss this appeal on the ground that the same has been taken from a non-appealable order. A judgment was entered for the respondents in March, 1872, but the blank which was left therein for the amount of the costs and disbursements was not filled by the clerk of the court below until March, 1875. Afterward, an execution was issued and the appellant filed motions to quash the same and re-tax the costs. The motions were overruled and the appellant appealed

from the orders of the court thereon. No appeal has been taken from the judgment, and there is no statement on appeal.

In *Rader v. Nottingham*, ante, 157, this court held that an order overruling a motion to re-tax the costs is not appealable. The opinion cited with approval the decisions of the supreme court of California under the same statute in support of this proposition. After this case had been determined that court decided in *Dooly v. Norton*, 41 Cal. 439, that a motion to re-tax costs is one to modify the judgment, and that an appeal can be taken from an order thereon. The only reason which is given for this view of the question is, that an error in many cases would be without redress if the statute received a different construction. The same argument can be used frequently, but it is usually disregarded by judicial tribunals. If there is any force in the suggestion, it should be addressed to the legislative assembly, which has the power to regulate the appellate jurisdiction of courts in this matter. No new authorities are referred to in *Dooly v. Norton*, supra, and the cases which have been heard by that court and are in conflict with its doctrines are not reconsidered and overruled. In *Flubacher v. Kelly*, 49 Cal. 116, the court holds that an order denying a motion to strike out a bill of costs can be reviewed only upon an appeal from the judgment. The laws of this Territory have not been amended in this respect, and we think that the case of *Rader v. Nottingham*, supra, should be affirmed. The motion of the respondents to dismiss the appeal from the order overruling the motion to re-tax the costs is granted.

The order overruling the motion to quash the execution is a "special order made after final judgment," from which an appeal can be taken to this court. Civ. Pr. Act, § 380; *Gilman v. Contra C. Co.*, 8 Cal. 52. But in the hearing on the appeal from this order, we cannot examine the grounds of the motion which are based upon any alleged error in the items of the costs and disbursements. The motion to dismiss the appeal from this order is overruled.

The case was then submitted on its merits. The motion to quash the execution was denied by WADE, J.

S. ORR, pro se.

The clerk had no authority to fill the blank in the judgment

three years after the order for the judgment had been made. Civ. Pr. Act, § 558; Freeman on Judgt. 72-74; *Chapin v. Broder*, 16 Cal. 419.

The bill of costs is void. *Burnham v. Hays*, 3 Cal. 115. Costs can be claimed only by a strict compliance with the statute. *Dooly v. Norton*, 41 Cal. 439.

The execution was issued for a sum in excess of the judgment and not authorized.

W. E. CULLEN, for respondent.

Judgments may be amended. Freeman on Judgt., § 71. The clerk is authorized to leave blanks in the judgment for the amount of the costs when ascertained. Cod. Sts. 149, § 558. For the effect of filling these blanks, see *Lind v. Adams*, 10 Iowa, 398; Freeman on Judgt., § 49.

BLAKE, J. Some of the facts of this case appear in the opinion upon the motion of the respondents to dismiss this appeal. The judgment was entered March 14, 1872, and the respondents filed a memorandum of their costs and disbursements on the following day, and claimed the sum of \$115.60. In March, 1875, the clerk of the court filled the blank left in the judgment by inserting \$208.65 as the amount of the costs and disbursements, and issued an execution therefor. These acts of the clerk were done in vacation, without any order of the court to amend the judgment. The order of the court, in overruling the motion of the appellant to quash the execution, must be reviewed.

The authority of the clerk is defined in the following section: "The clerk shall include in the judgment entered up by him any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he shall, within two days after the same shall be taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and shall make a similar insertion of the costs in the copies and docket of the judgment." Civ. Pr. Act, § 558. The clerk is required to insert in the blank in the judgment, the amount of the costs within two days after they have been taxed or ascertained. An-

toine Company v. Ridge Company, 23 Cal. 219. The mode of taxing and ascertaining the costs is regulated by the Civil Practice Act, and the insertion of this amount in the blank is the ministerial act of the clerk. If this officer exceeds his power, and fills the blank with illegal costs, his acts are void. *Chapin v. Broder*, 16 Cal. 419. The respondents were entitled to their costs in the court below, and claimed them by delivering their memorandum to the clerk within two days after the judgment had been rendered. Civ. Pr. Act, §§ 548, 557. When the respondents filed their memorandum of their costs and disbursements, the clerk was notified that the amount had been ascertained. Within two days, or a reasonable time thereafter, this officer should have inserted the same in the blank left in the judgment for that purpose. The appellant was not allowed costs, and the only costs to be taxed or ascertained after the judgment was entered, were those which were claimed by the respondents in their memorandum.

We can take another view of the question. Costs constitute a part of the judgment in an action, and can be reviewed by an appeal from the judgment. *Rader v. Nottingham*, ante, 157; *Lasky v. Davis*, 33 Cal. 677. An appeal from a final judgment must be taken within one year after its rendition. Civ. Pr. Act, § 369. The aggrieved party is deprived of his right of appeal if the blank left in the judgment is filled three years after it has been rendered. The reasonable time within which the officer must insert the amount of the costs in the blank must be less than one year, in order that an appeal can be taken if necessary or desirable.

The clerk erred in inserting in the blank referred to the sum of \$208.65, and issuing an execution for the same, when the respondents claimed in their memorandum of costs \$115.60. This conduct is not explained in the transcript, although it appears that the respondents did not include in their memorandum the fees of the clerk and sheriff, and did not regard them as an essential part of this paper. The fees of these officers are costs and disbursements, and should have been embraced in the memorandum of the respondents at the time it was filed.

At common law neither the plaintiff nor the defendant could

recover costs *eo nomine*. Bouv. L. D., title Costs. The respondents cannot obtain their costs and disbursements after their failure to pursue strictly the mode pointed out by the statute. *Chapin v. Broder, supra*. The action of the clerk in inserting, in the blank left in the judgment, about three years after its rendition, \$208.65, or any other sum, is void. The order of the court overruling the motion of the appellant to quash the execution issued upon this judgment is reversed.

Judgment reversed.

CREIGHTON, appellant, *v.* BLACK, respondent.

MILITIA VOUCHERS — *not negotiable* — *statutory prohibition* — *how transferred* — *not forfeited*. Claims against the United States, such as the so-called Montana Militia vouchers, are not negotiable paper, that can be transferred by mere delivery. The statutes of the United States (see Rev. Sts. of the U. S., p. 693, § 3477) expressly prohibit it, and no custom to the contrary is entitled to be heard in evidence. Parties receiving such vouchers from a person not legally entitled to them, or authorized to dispose of the same for the lawful owner, and without the formalities that the law requires, can acquire no title thereto, but are rightly chargeable with a knowledge of the statute, and the lawful owner does not lose his right thereto by neglect to enjoin the transfer of the same.

Appeal from First District, Madison County.

W. F. SANDERS and J. G. SPRATT, for appellants.

JOHNSTON & TOOLE and S. WORD, for respondent.

WADE, C. J. In this case the court below found certain facts and rendered judgment for the defendant thereon. There were no specific exceptions to the findings, and no motion for a new trial. We cannot, therefore, look into the evidence to determine whether the facts found are supported by it, but must take such findings as correct and ascertain if the judgment rendered thereon was justified. The findings are as follows:

“1. That the vouchers described in plaintiff's complaint were issued by one Hamilton Cummings, purporting to be a quartermaster-general of Montana militia, but I do not find from the proof that any such office or officer was authorized by law, and therefore find that said vouchers were issued without authority of law, and that they had no value whatever in law.”

“2. That said vouchers were, however, issued to and in favor of defendant, for forage furnished by him and his partner for said Montana militia.

“3. That after the same were so issued the defendant signed a blank receipt, at the bottom of each of said vouchers, when the same was retained by said Cummings for the purpose of procuring the signature of approval of the governor of the Territory thereto.

“4. That said Cummings thereafter refused to deliver said vouchers to the defendant, but fraudulently retained the same.

“5. That the plaintiffs, without any knowledge of the fraudulent manner by which said Cummings held said vouchers, obtained the same from said Cummings as collateral security for a *bona fide* debt, yet unpaid, and largely in excess of the amount due, and finally paid upon said vouchers.

“6. That all such vouchers issued by said Cummings, as such quartermaster-general, passed in trade, barter and sale in the Territory of Montana, upon delivery, and at the rate of from five to ten cents per dollar upon their face.

“7. That the vouchers, so obtained by the plaintiffs from said Cummings, remained in the hands of the plaintiffs, unknown to the defendant for several years, and until one General Hardie had been appointed by the general government at Washington to repair to the Territory of Montana to examine into the cause of issuing such warrants or vouchers, and to make report thereof, at which time one of the plaintiffs, P. A. Largey, exhibited the vouchers in controversy herein to the defendant, and requested him to make proof of the same before said General Hardie.

“8. That said defendant then received said vouchers from said Largey, and then gave his receipt therefor, for the collection of the same, and then made proof of the same before said Hardie.”

“9. That some time thereafter, when the general government,

acting upon the report of said Hardie, was about taking steps for the adjustment of such vouchers and claims, the plaintiff Largey demanded of, and then received back from said defendant, the said vouchers in controversy, and some time thereafter caused the same to be presented to the designated department at Washington for final adjustment and payment, pursuant to an act of congress relative thereto.

"10. That said defendant, both before said General Hardie, at Helena, Montana, and before said designated authority or department at Washington, protested against payment upon or on account of said vouchers being paid to plaintiff, or to any person other than himself.

"11. That both the said defendant and said Largey presented proofs of their respective claims to and on account of said vouchers, to and before said department at Washington, when upon a hearing thereof the same was decided in favor of the defendant, and for the sum of \$6,891.70 in full of said vouchers, and which was then paid to defendant, who then departed from the city of Washington to the State of Missouri.

"12. And I do not find from the proofs that any false or fraudulent representations were made by either of the parties relative to the vouchers in controversy."

Upon these facts the defendant had judgment.

The appellants assert that these vouchers were transferable by delivery, and then invoke the principle that where one of two innocent parties must suffer by the wrongful or fraudulent act of a third, the one who enables the third to commit the act must bear the loss. Therefore, that Black, who permitted the vouchers to remain in the possession of Cummings for several years, without taking any action to restrain his assignment or transfer of them, thereby furnished the means and placed it in the power of Cummings to defraud plaintiffs, hence Black must suffer instead of plaintiffs.

This principle is applicable to certain well-defined cases. A *chose in action* is not transferable by delivery, but if the owner places it in the hands of another, together with such *evidences* of ownership as to the common understanding of the world usually ac-

companies the authority of disposal, then a sale would bind the owner and protect an innocent purchaser.

The authorities are cited and well considered in the case of *Brewster v. Sime*, 42 Cal. 147, where it is held :

“In this State stock is personal property, and the general rule is, that if the owner of such property places it in the possession of another, and confers upon him the usual *indicia* of ownership or right of disposal, he is bound by any disposition made of it to one who acquires it, without notice, for a valuable consideration, **on the faith of such *indicia***, (citing) *Saltus v. Everett*, 20 Wend. 278–280 ; *Com. Bank, etc., v. Kortright*, 22 id. 361; *Western Transp. Co. v. Marshall*, 37 Barb. 509, 515; *Crocker v. Crocker*, 31 N. Y. 507; *Fatman v. Lobach*, 1 Duer, 354; 2 Kent’s Com. 621; Story’s Agency, §§ 83, 94, 228; *Bridenbecker v. Lowell*, 32 Barb. 17; *Johnson v. Jones*, 4 id. 373; *Bank of Metropolis v. New Eng. Bank*, 11 How. 240. The mere delivery of the possession of personal property does not, standing alone, constitute such an *indiciu*m of ownership as will bind the owner. * * * There must be something more than the mere delivery of the possession to constitute such *indicia* of ownership as will bind the owner.”

Applying these principles to the case in hand, what do we find? These vouchers were issued to Black, in payment of certain property furnished by him to the government, all of which appeared on the face of the vouchers, and attached thereto was his receipt in blank for the amount he should receive. There was nothing upon the voucher itself, or in any circumstances connected therewith, or its possession by Cummings, to indicate, either directly or remotely, that Black had parted with his title. He, Cummings, received the property for a special purpose, and fraudulently retained the possession, and when he sold the same to appellants, there was no evidence whatever, except the bare fact of possession, to indicate to them that he was the owner, while the vouchers themselves conclusively notified them that Black was the owner.

We have seen that the bare fact of possession is not sufficient to bind the owner, but the appellants, to avoid the force of this principle, proved on the trial, and the court found as a fact, that these vouchers issued by Cummings, as such quartermaster, passed

in trade, barter and sale, in the Territory of Montana, upon delivery, and, therefore, that the rule is not applicable to this species of property. The fact that these vouchers, in this Territory, were negotiated by delivery does not make them negotiable paper. If they were so negotiated, it was in violation of the settled principles of the common law, and of an express statute, and those receiving them by mere delivery did so at their peril. These claims are against the United States, and the statute upon the subject of the transfer of such claims is as follows:

“All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payments of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers and assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer, and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney, to the person acknowledging the same.” Rev. Sts. of the U. S., § 3477.

In the face of this statute, the fact that these militia vouchers, in this Territory, were assignable by delivery, before they had even been presented to the government and allowed, is not worthy of any consideration. The provisions of positive law cannot be so easily disregarded, and the attempt to make the violation of such law the foundation of a right is futile.

Black had the right to rely upon the provisions of this statute, and to know therefrom that his mere delivery of the vouchers to Cummings carried with it no right, and the appellants, when they purchased the same from him, were chargeable with a knowledge of the law, and ought to have known that his transfer and delivery of possession conferred no title; first, because the assignment from

Black to Cummings was void, and second, because his transfer to them was also void.

Black, therefore, was not chargeable with neglect, even if failing to enjoin the transfer of the vouchers by Cummings. Cummings had no title, and conveyed none to appellants.

Judgment affirmed, with costs.

Judgment affirmed.

BLAKE, J., did not participate in this case, having been of counsel.

PLAISTED, appellant, *v.* NOWLAN, respondent.

CASE AFFIRMED. The case of *Barkley v. Logan*, *ante*, 296, holding that an appeal cannot be taken from a part of a judgment, affirmed.

SUPREME COURT — appellate jurisdiction. The Civil Practice Act has superseded the rules of the high court of chancery in England, and does not allow an appeal from "every actual determination" of the court below.

STAY OF EXECUTION — judgment. No part of the judgment can be executed, if the proper undertaking to stay the execution has been given.

CROSS-APPEALS — transcript. Every party to an action can appeal from the judgment, and must prepare his transcript for this court.

Appeal from Second District, Deer Lodge County.

THE judgment was entered by KNOWLES, J.

CHUMASERO & CHADWICK, for appellant.

An appeal will lie from a portion of a judgment or decree when the same is partly against and partly in favor of the appellant. A party is not compelled to bring up the part of the decree that is in his favor.

The decision of *Barkley v. Logan*, *ante*, 296, is the only one to the contrary. The statute of New York is the same as our own, and the decisions and works of practice hold that an appeal can be taken from a part of a judgment. Van Santvoord's Eq. Pr. 652-3, and cases cited; Miller's Pl. & Pr. 706; 1 Barb. Ch. Pr. 382, 383; 1 Monell's Pr. 737; 2 id. 15; *Cuyler v. Moreland*, 6 Paige, 275; *Hone v. Van Schaick*, 7 id. 221.

Statutes giving the right of appeal are construed liberally toward the appellant, so that decisions may be reviewed and errors corrected.

CLAGETT & DIXON, for respondent.

BLAKE, J. This case is before us upon the objections of the respondent, Nowlan, to the right of the appellant to be heard on the errors assigned in the transcript. It is claimed by the respondents, and admitted by the appellant, that this is an appeal from a certain part of a decree, and the respondent relies upon the authority of *Barkley v. Logan*, ante, 296, to sustain his position. The counsel for the appellants in that action have been allowed to submit an argument on their motion for a rehearing, which involves an examination of the same question. It will not be necessary to consider the other grounds referred to by the respondents, if we affirm *Barkley v. Logan*.

The appellate jurisdiction of this court is regulated by the laws of the Territory, which must be consistent with the constitution of the United States and the Organic Act. Parties who complain of errors committed by inferior tribunals must comply strictly with the provisions of the Civil Practice Act, which prescribe the manner of taking appeals to this court. Courts do not assume jurisdiction, and a judgment that has been rendered by a court which has exceeded its jurisdiction, is void. *Creighton v. Hershfield*, 1 Mon. 649. The only subject which we can consider in determining this jurisdictional question is, the mode of taking appeals to this court under the statute.

We intend to avoid as much as possible the repetition of the reasons by which the court arrived at its conclusions in *Barkley v. Logan*. The appellant has called our attention to the decisions of the courts of New York, which appear to be in conflict with the views of this court. To ascertain the weight to which they are entitled, we must examine the laws of that State, which limit the jurisdiction of its courts. It has always been the practice of their courts to allow an appeal from a portion of a decree, especially in equity cases. 1 Van Santvoord's Eq. Pr. 653. They followed the rules of the high court of chancery in England, which

holds that a party who appeals from any part of a judgment admits the remainder to be correct. 2 Danl. Ch. Pl. 1547. The eleventh section of the Code provides that the court of appeals shall review "every actual determination" made by certain courts. "The supreme court has all the powers of the supreme court and the former court of chancery." Voorhies' Code, § 17, n. a, and cases there cited. The legislature of New York declared the jurisdiction and power of the court of chancery to be co-extensive with that of the high court of chancery in England, with certain limitations. 1 Van Santvoord's Eq. Pr. 4. All the decisions of the courts of this State, which have been cited by the appellant, are based upon the statutes and equity practice, and are not applicable to this case. Our Civil Practice Act does not authorize appeals from "every actual determination" of the court below, and the rules of the high court of chancery in England cannot be regarded in this Territory, in which there is one form of civil action in law and equity. They have been superseded by our Practice Act. *Cordier v. Schloss*, 12 Cal. 147.

The appellant cites, also, Miller on Pleading, 706. This author has stated substantially sections 3177 and 3178 of the Code of Iowa. The notice of appeal must define the part of the proceedings appealed from. It is stated that an appeal from a part of a judgment will not disturb or delay the rights of any party to the judgment or part of the judgment not appealed from, but the same will proceed as if no such appeal had been taken. There are other sections which contain the same clauses relating to appeals from part of a judgment, and the intention of the law makers is clear and certain. But the language of our Civil Practice Act is different, and does not admit of this interpretation. The time within which appeals can be taken, the character of the notice and appeals which are allowable, have been carefully defined. Civ. Pr. Act, §§ 369, 370, 380. The effect of these sections has been discussed fully in the opinion in *Barkley v. Logan*, and we deem it sufficient to refer to the views expressed therein as sound.

There are other sections which may be considered in this connection. On an appeal from a final judgment, the appellant must furnish the court with a transcript of the notice and undertaking on appeal, the judgment and other papers; and on other appeals

the appellant must furnish this court with copies of the notice and undertaking on appeal, the judgment and other papers. Civ. Pr. Act, § 379. The appeal may be dismissed if the appellant fails to furnish these papers. It will not be contended that the appellant complies with these provisions by furnishing this court with a transcript or copy of a part of a notice or undertaking on appeal. And yet the same reasons which can be urged in favor of such a proposition are applicable to the party who maintains that he can bring before us for review a part of the judgment of the court below.

This construction is sustained by the comparison of the sections which regulate undertakings on appeal. They provide that the execution of the judgment appealed from shall not be stayed, unless certain undertakings have been given. Civ. Pr. Act, §§ 381 to 386 inclusive. The phrase, "the judgment or order appealed from," is used frequently, but there is no language similar to that which is found in the Iowa Code, and states that an undertaking can be given to stay the execution of a part of a judgment. Under our statute the judgment, and every part thereof, cannot be enforced after the proper undertaking on appeal has been filed. All proceedings in the court below are suspended after an appeal has been properly taken to this court. *Thornton v. Mahoney*, 24 Cal. 583; *People v. Frisbie*, 26 id. 135. If the legislative assembly contemplated that an appeal could be taken from a part of a judgment, the statutes would have been enacted allowing the giving of an undertaking to stay the execution of a part of a judgment, and then the part which was not appealed from could be enforced. The absence of these provisions can be accounted for in only one way. It is the intention of the legislators that appeals shall be taken from the whole judgment, and not a part thereof.

The appellant insists that there can be no cross-appeals if this construction of the Practice Act is adhered to. In California the supreme court holds, under the same statute, that each party who appeals must present his own record, which must be prepared according to the requirements of the Civil Practice Act. All the parties to the action can appeal from the judgment of the court below; but every respondent can only be required to

respond to the record which the appellant has served upon him. *Gates v. Walker*, 35 Cal. 289.

Counsel remarked during the argument that there is no case in the California Reports which discusses this question. Assuming that this statement is correct, the omission can be explained satisfactorily. In all the causes in which the notice of appeal has been published the same form has been adopted substantially, and the aggrieved party appeals from the judgment made and entered in the court below, and the whole thereof. 2 Bancroft's Forms, 552.

In the cases which have been heard in the supreme court of the United States, we have not discovered one in which an appeal has been taken from a part of the judgment. The language of the Judiciary Act is the same in effect as that of our Organic Act and Practice Act, respecting appeals from final decisions or judgments.

The motion for a rehearing in *Barkley v. Logan* is denied, and the appeal in this case is dismissed.

Appeal dismissed.

CAMPBELL, appellant, v. RANKIN, respondent.

EVIDENCE—*best proof of location and possession of mining claim.* C. brought this action to recover damages for a trespass upon a mining claim in a certain gulch. Before the trial C. moved for a continuance, and offered an affidavit in support of his motion, showing that the written laws of the gulch had been destroyed; that the laws regulated the location and holding of the claim in controversy, and defined its boundaries; and that the predecessors in interest of C. owned and possessed the claim under these laws, which were then in force. At the trial, C. offered oral testimony to prove that he owned and possessed the claim; that R. trespassed thereon, and admitted that there was such a claim, and that he knew where the claim was, and was upon it on a certain day. C. also offered some judgments and deeds. The testimony was excluded by the court. *Held*, that the court can direct the order of proof and require the best evidence to be produced before any other testimony is submitted. *Held*, also, that the affidavit for the continuance disclosed the best evidence that could be produced at the trial by C., and that the court properly rejected the testimony of C. at the time it was offered.

ESTOPPEL BY JUDGMENT WHEN MANY ISSUES OF FACT ARE SUBMITTED TO JURY. At the trial, C. offered in evidence the judgment entered in his favor in an action commenced by R. against C. to recover the possession of a mining claim in Confederate gulch and \$250 damages. C. maintained that the same property was involved in both cases, and that R. was estopped from denying that C. owned it. It appears from the pleadings that R. was required to prove that he was the owner of the claim, or entitled to its possession, and that C. wrongfully entered thereon and took and withheld its possession from R. The court excluded the evidence. *Held*, that a judgment which has been rendered in an action that has been tried upon its merits is a bar to another suit between the same parties, or their privies for the same cause. *Held*, also, that the judgment offered by C. may have been based upon one of a number of questions of fact, and is not conclusive upon any of them in this action, when there are no means of determining upon which the verdict has been found.

Appeal from Third District, Meagher County.

THE case was tried before WADE, J.

W. E. CULLEN and SHOBER & LOWRY, for appellant.

The judgment roll in *Rankin v. Campbell et al.* is conclusive of the issues in this action and should have been admitted in evidence. Starkie's Ev. (8th ed.) 323; Smith's L. C. 424; Freeman on Judgt., §§ 252, 302, 249.

In that case the issue made by the pleadings relates to the title and right of possession of the premises in controversy. A verdict for the same cause of action between the same parties is conclusive. The cause of action is the same when the same evidence will support both actions. Freeman on Judgt., ch. 12, and cases cited; *Wood v. Jackson*, 8 Wend. 9; Starkie's Ev. 334. The judgment in *Rankin v. Campbell et al.* was proper testimony under the general issue, if it was not a perfect estoppel.

A party may introduce his proof in his own order. *Palmer v. McCafferty*, 15 Cal. 334.

It was proper to introduce in evidence a deed under which appellants had actual possession of the ground in dispute. 2 Greenl. Ev., §§ 298, 299.

Appellants need not show that their possession was according to local laws. Like the vendee under a deed, appellants should have been allowed to make a *prima facie* case upon possession. This

is enough until it is shown that the possession is **wrongful**. *Penn. M. Co. v. Owens*, 15 Cal. 136; *English v. Johnson*, 17 id. 119. The possession of appellants must be presumed to be rightful and is sufficient to maintain this action.

The court erred in excluding evidence of the possession of the premises by appellants and the laws of German district, and the judgment roll in *Campbell v. Ford*. Damages to the property in controversy were recovered by the predecessors of appellants in that action in which respondent was the real party in interest.

The admissions of respondent that there was such a claim as that described in appellants' complaint, and that appellants were the owners of it, were clearly competent. 1 Greenl. Ev. 51; 1 Starkie's Ev. 90; 1 Phillips' Ev. 89.

CHUMASERO & CHADWICK and TOOLE & TOOLE, for respondent.

Appellants should have described the ground in controversy by metes and bounds. *Hess v. Winder*, 30 Cal. 349; Civ. Pr. Act, § 66; Cod. Sts. 389, § 1.

The description in the complaint is insufficient and the evidence offered was incompetent under the issues. *English v. Johnson*, 17 Cal. 119; *Coryell v. Cain*, 16 id. 573; *Attwood v. Fricot*, 17 id. 37; Yale Min. Laws, 61.

The appellants' affidavit for a continuance showed that the ground was within an organized mining district and held under miners' rules. Respondent could introduce no proof until they showed that there was a tract known as "claim No. 2, Green Horn gulch." Yale's Min. Laws, 61-6; *Line Y. Co. v. Oregon Co.*, 7 Cal. 40; *Table M. T. Co. v. Stranahan*, 20 id. 198; *King v. Edwards*, 1 Mon. 235. No testimony could be admitted until this was proved.

The deed was properly excluded. *Hicks v. Coleman*, 25 Cal. 134; *Hess v. Winder*, 30 id. 358.

The judgment roll in *Rankin v. Campbell et al.* was not *res adjudicata* of any of the rights in this case, and was therefore excluded. *Kennedy v. Scovil*, 14 Conn. 70, and authorities above cited.

The receipt of evidence out of its proper order is within the discretion of the court. Its reception or rejection is not error un-

less there is an abuse of this discretion. *Lick v. Diaz*, 37 Cal. 437; *Crosett v. Whelan*, 44 Cal. 200.

As to estoppel by record generally, see Freeman on Judgt., §§ 250-264; *Lentz v. Victor*, 17 Cal. 274; *Flandreau v. Downey*, 23 id. 354; *Irvine v. Adler*, 44 id. 560.

BLAKE, J. The appellants bring this action to recover damages for an alleged trespass upon placer mining property. They allege in their complaint that they are the owners and possessors of "what is known and designated as claim number two below discovery in Green Horn gulch, Meagher county, Montana Territory." They describe the premises as follows: "Commencing at the intersection of the rim rocks of Green Horn gulch with Confederate gulch, and extending up said Green Horn gulch to the lower line of what is known as claim number one below discovery in Green Horn gulch, a distance of about two hundred feet, and embracing said distance the entire channel of said Green Horn gulch from rim rock to rim rock of said gulch." It is alleged that the respondent committed the trespass upon a portion of this property.

The answer denies specifically the averments of the complaint, the existence of the claim therein described and that the same had any description or boundary. Before the action was tried, the appellants made a motion for the postponement of the trial and offered in its support the affidavit of one of the appellants. It sets forth that the appellants can prove by a certain witness that the original written records and laws of said Green Horn gulch had been destroyed; that the size and manner of locating and holding the claims in said gulch were established and controlled by said records and laws; that the records "showed the size, lines, boundaries and location of claim numbered two below discovery in said gulch," and that the records "further showed that the predecessors in interest of these plaintiffs took up, possessed, held, owned and occupied said claim in accordance with the local rules and regulations of miners then in force in said gulch."

The evidence offered by the appellants was excluded at the trial and the exceptions to this ruling of the court are before us for review. The oral evidence tended to prove that on a certain day

one of the appellants was on "claim No. 2 in Green Horn gulch below discovery;" that he knew where the claim was situated and had been in the possession of it several years; that he had had a conversation with the respondent, who had admitted that there was such a claim; that the appellants were the owners of the claim and the respondent had trespassed on the same; that there was a claim known as claim number two below discovery in Green Horn gulch, and that the appellants had been in its possession under certain deeds.

The written evidence comprised the judgment rolls in the cases of *Rankin v. Campbell et al.*, and *Campbell et al. v. Ford et al.*, the laws of the German mining district, and a deed to some of the appellants and their predecessors in interest. The action of *Rankin v. Campbell et al.* was brought to recover damages for an alleged trespass upon the gulch portion of the mining claim numbered eight in Confederate gulch, which all the parties conceded was located in the German mining district. *Campbell et al.*, the defendants, averred that it was known as claim numbered two below discovery in Green Horn gulch. Judgment was entered for *Campbell et al.*, who did not pray in their answer for affirmative relief. In *Campbell et al. v. Ford et al.*, the plaintiffs recovered damages against the sureties upon the injunction undertaking given in *Rankin v. Campbell et al.* Some of the facts appear in the reports of these cases. *Rankin v. Campbell et al.*, 1 Mon. 300; *Campbell v. Metcalf et al.*, id. 378. The deed purported to convey to some of the appellants property described as "our mining claim No. 2, below discovery in Green Horn gulch, German district, Meagher county, Montana Territory." The bill of exceptions states that the laws of the German district were offered as evidence to show that the dividing line between the claims in Confederate gulch and its tributaries is confined to the intersection of the rim rocks of the gulches.

The mining property mentioned in the complaint is not described by legal subdivisions, or metes and bounds, which are required by the Civil Practice Act, § 66. Under the issues made by the pleadings, the appellants could not recover if they failed to prove that they owned and possessed a certain tract of mining ground known as "claim number two, Green Horn gulch." This

court has held that the court in which the action is tried can direct the order of proof, and we do not think that the rule will be doubted. *Griswold v. Boley*, 1 Mon. 558.

It cannot be denied that most of the testimony which was rejected at the trial was competent and relevant in similar actions to establish the existence of the claim in controversy, and support the allegations of the complaint. But the appellants, in their affidavits filed with the motion for a continuance, disclosed the facts that have been referred to. They informed the court that this claim was within an organized mining district, and that their title and right of possession to the same were founded upon its written rules and customs. It is a legal presumption that these laws were in force in Green Horn gulch and the district including the mining claim of the appellants. *King v. Edwards*, 1 Mon. 235. The court could not ignore its knowledge of these facts, which must control its discretion in the admission of testimony. The appellants, by their voluntary conduct, determined the character of the evidence which was demanded upon the trial. The action of the court, under the circumstances, has been defined clearly, and we will examine the rules governing its discretion in the direction of the order of the proof.

Prof. Greenleaf states these conclusions: The rules regulating the introduction of evidence require that the best evidence of which the case in its nature is susceptible must be produced. When it appears that "better evidence is withheld, it is fair to presume that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated." "Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is, in general, admitted." 1 Greenl. Ev., §§ 82, 84. The application of these elementary principles is decisive of this branch of the case. The appellants never offered to introduce the written rules and customs of Green Horn gulch, or show that they had been lost or destroyed, and the evidence that was excluded could not be substituted to prove the existence of the mining claim described as claim numbered two in this gulch. The written rules and customs were the best evidence in this case.

The court ruled properly that no evidence of the possession of

the property by the appellants, or declarations of the respondent regarding the same, could be admitted until the identity of the mineral ground had been established by the highest testimony. The deed does not contain a description which can aid the jury in ascertaining the boundaries of the claim, and was incompetent.

The appellants contend that the judgment roll in *Rankin v. Campbell et al.* is conclusive of some of the issues in this action, and that the respondent is estopped from denying that the appellants are the owners of the property. It is maintained that the judgment entered in favor of *Campbell et al.*, in that cause, was made in a case which was tried upon its merits, between the same parties, and in which the same subject-matter was litigated as that under consideration. If this proposition is correct, that judgment would be a complete bar to another suit between the same parties or their privies for the same cause. "When a fact has once been put in issue and determined by a final judgment in the course of a judicial proceeding, such judgment is conclusive evidence of the existence of the fact in all controversies between the same parties in which it is material." *Stockwell v. Silloway*, 113 Mass. 385, and cases there cited; *Bigelow v. Winsor*, 1 Gray, 301; *Footte v. Gibbs*, id. 412; *Jones v. Petaluma*, 36 Cal. 230; *Boggs v. Clark*, 37 id. 236; *Tracy v. Merrill*, 103 Mass. 282, and cases there cited.

It appears from the pleadings, in *Rankin v. Campbell et al.*, that Rankin was required to establish by the testimony that he was the owner of a certain mining claim in Confederate gulch, or entitled to its possession; that the defendants wrongfully entered thereon and took and withheld its possession from him. The prayer of the complaint is for the possession of the property, \$250 as damages and a temporary and perpetual injunction. There are other allegations in the complaint respecting the insolvency of *Campbell et al.*, which might be material if the court was asked to grant equitable relief. The defendants prayed to be dismissed without day and for their costs, and no valid judgment could be rendered that they were entitled to the mining ground described in the pleadings. If Rankin failed to prove some of the material allegations referred to, *Campbell et al.* might obtain a judgment without offering any evidence. **Rankin**

might have the right of property and the defendants might have the right of possession. If the jury based the verdict upon the failure of the plaintiff to show that Campbell *et al.* withheld the possession of the premises from him, it cannot be contended that the question of ownership was decided. *Arnold v. Arnold*, 17 Pick. 4.

Does the judgment entered in *Rankin v. Campbell et al.* constitute an estoppel in this action? We think that the law determining this question has been announced in the following cases. In *Richardson v. Boston*, 19 How. 263, Mr. Justice GRIER says: "The plea of the general issue, in actions of trespass or case, does not necessarily put the title in issue; and, although the judgment is conclusive as a bar to future litigation for the thing thereby decided, it is not necessarily an estoppel in another action for a different trespass." In *Burlen v. Shannon*, 99 Mass. 202, Mr. Justice FOSTER examines the authorities and says: "The ground taken by the defendant is, that a general verdict and judgment are conclusive in favor of the prevailing party as to all issues actually involved in the trial, upon which any evidence was offered and which were submitted to the jury, although it may not appear that they were the very points on which the decision turned, and it may be doubtful in favor of which party any one of them was found, or even whether as to all of them the jury came to any conclusion. Such, however, is not in our opinion the true doctrine of the law. A verdict and judgment are conclusive by way of estoppel only as to those facts which were necessarily involved in them, without the existence and proof or admission of which such a verdict and judgment could not have been rendered." The argument of the appellants is the same as that submitted by the defendant in *Burlen v. Shannon*, *supra*, and refuted by the court. In *Lea v. Lea*, 99 Mass. 496, the court says that "there are no means of determining upon which of the three consistent grounds of defense the verdict was rendered; and therefore it cannot be conclusive upon either." Bigelow on Estoppel (2d ed.), 82, 88, and cases there cited; *Packet Co. v. Sickles*, 5 Wall. 580; *Leonard v. Whitney*, 109 Mass. 268. We are unable to decide on which of the questions of fact submitted to the jury, in the case of *Rankin v. Campbell et al.*, the

verdict was based, and do not think that the judgment is conclusive upon any of them. The ownership and right of possession of the property in controversy are not necessarily involved in the determination of the action by the jury. The judgment roll was not competent testimony in this case. The suit of *Campbell et al. v. Ford et al.* was the effect of the judgment in the other action, in which the temporary injunction was dissolved, and its judgment roll could not affect the issues which were tried in this cause.

Judgment affirmed.

VANTILBURGH, appellant, v. BLACK, respondent.

ESTOPPEL. The doctrine of estoppel does not apply to prevent a mortgagee from purchasing the mortgaged premises or a portion thereof, when sold under the foreclosure of mechanic's liens, nor to prevent his taking possession of such premises under a writ of assistance when the time of redemption under such sale has expired, nor are the rights thus acquired lost or merged in his subsequent foreclosure of his mortgage.

JUDGMENT — *evidence* — *jurisdiction* — *indefiniteness* — *representations*. On an appeal from a judgment alone, when there was no motion for a new trial, the appellate court cannot review the evidence upon which the court below based its findings.

The judgment of a court having jurisdiction of the parties and the subject-matter is not void and cannot be attacked collaterally.

Judgment in a lien case is not void through indefiniteness of description of the property subject to such lien, and cannot be attacked therefor collaterally.

A judgment will not be disturbed on the ground of representations made by mortgagee at the former lien sale, the same being true in fact.

Appeal from First District, Jefferson County.

SHOBER & LOWRY and A. G. P. GEORGE, for appellant.

CHUMASERO & CHADWICK, for respondent.

WADE, C. J. This is an appeal from a judgment for the defendant in an action to set aside certain decrees in favor of the defendant, and for other relief.

The facts material to a determination of the rights of the par-

ties, are as follows: On the 6th day of November, 1872, the plaintiff, Vantilburgh, and wife executed to the defendant, Black, a mortgage upon a certain tract of land known as the Warm Springs Ranch, comprising one hundred and sixty acres, upon which there was situate a water right and a flouring mill then in process of construction, and upon a certain other tract of land comprising one hundred and sixty acres, to secure the payment of a certain promissory note for \$6,000, executed by Vantilburgh and wife, to Black, of that date. At the date of the execution of the note and mortgage, the flouring mill upon the mortgaged premises was in process of construction by a man named Otho Curtis, and another named Isaac Dodgson, who commenced work thereon September 26, 1872, and continued until the last of January, 1873, when, within the statutory time, they secured mechanics' liens upon the mill, the water right appurtenant thereto, the mill site, and a convenient space around said property of one acre of ground. On the 10th of March, 1873, Curtis filed his complaint against Vantilburgh to foreclose his lien, making Black, by reason of his mortgage of November 6th, a party defendant, who was duly served with summons, but did not answer. On the 12th of April following, Curtis procured a decree for the sale of the property included within his mechanic's lien, and on the 16th day of May, 1873, by virtue of such decree, the mill, water right, appurtenances and mill site were sold by the sheriff of Jefferson county, at public auction, one Lineberger becoming the purchaser at such sale.

On the same day, and in pursuance of a similar decree, procured by Dodgson upon his lien, the same property was again sold, and Lineberger became the purchaser thereof, and received certificates of sale from the sheriff.

On the 3d of November, 1873, Black purchased these certificates from Lineberger, paying him therefor the sum of \$774.59, being the amount of his bids, together with the interest thereon, and the penalty. On the 16th day of January, 1874, Black received from the sheriff his deeds for the premises and property so bid off and sold to Lineberger, and on the 4th day of March, was placed in the possession thereof by virtue of a writ of assistance, issued upon petition of Black, and the order of the court thereon.

By virtue of these proceedings Black had received a deed for, and had entered into the possession of the flouring mill, water right, mill site, and one acre of ground as above described. Subsequently to the execution of the deed to him by the sheriff, to wit: on the 30th day of January, 1874, Black filed his complaint to foreclose his mortgage for \$6,000, of November 6th, 1872, upon all the property described in the mortgage, including the mill, mill site, and all the property sold by virtue of the foreclosure of the mechanic's liens of Curtis & Dodgson, and for which he then held the sheriff's deed, and on the 24th day of February, 1874, he obtained a decree authorizing a sale of all the property described in the mortgage, as well the property sold by virtue of the foreclosure of Curtis & Dodgson, and of which he was then the owner, as all the other lands and property therein described, and on the 1st day of April, 1874, all of said property was sold at public auction, and Black became the purchaser thereof.

Under this state of facts Vantilburgh rests his demands for a reversal of the judgment herein in favor of Black, mainly upon this proposition: that Black, after he had procured a title to the mill property, caused his mortgage thereon to be foreclosed and the property sold under the decree, himself becoming the purchaser thereof and thereby; that he sold the entire interest of the mortgagor and mortgagee in the property; that he thereby surrendered his title to the mill property procured in the lien cases; that thereafter he could claim only such title in the property as resulted from his purchase in the foreclosure sale, and, therefore, that the writ of assistance, resting its validity upon his title in the lien cases, was wrongfully issued and is void. If the conclusion deducible from the premises is incorrect, then there is not much left in the case. If, notwithstanding the sale under the decree of foreclosure, Black still retained his title by virtue of the sheriff's deeds in the lien cases, then the writ of assistance was properly issued, providing such deed gave him the right to the possession of the property. What was the effect of the foreclosure and sale of the mill property upon Black's previously acquired title? The object of a foreclosure is to sell the mortgagor's interest in the mortgaged property, the application of the proceeds upon the debt, and a judgment for any deficiency.

Black, as mortgagee under our statute, held a lien upon the property, and not a constitutional estate therein, and in an ordinary foreclosure the only interest affected thereby is that of the mortgagee's lien and the mortgagor's title. The purpose of the decree is to subject the latter to the payment of the former, and beyond this the title or interest of the mortgagee is not necessarily brought into question. Certainly not by the mere act of procuring a foreclosure and sale of the mortgagor's interest in the property. After a foreclosure and sale of the property, would the mortgagee be estopped from asserting his previously acquired title? Estoppel rests upon fraud. If no one is defrauded or injured, then no one is estopped.

If a mortgagee should procure a foreclosure of his mortgage, and a sale of the property thereunder, and an innocent third person should become the purchaser at such sale, then the mortgagee, we should say, would be estopped from thereafter asserting any title to the property thus sold by his procurement, for the reason that such act would be a fraud upon the purchaser. To permit any thing of the kind would endanger almost every judicial sale, or tend in that direction. But where the mortgagee himself becomes the purchaser, he only strengthens his previous title, and there is no ground for estoppel. He cannot defraud himself. The assertion of his previously acquired title in such a case injures no one, and no one can complain thereof. The whole theory of the appellant's case rests upon the doctrine that the mortgagee and a stranger, when they purchase at a foreclosure sale, stand in precisely the same position, and the distinction is entirely lost sight of that, while in the case of a stranger, the mortgagee might be estopped because of fraud, but that in his own case the doctrine of estoppel would not apply, because he cannot defraud himself to the injury of another.

Many authorities are cited to maintain this proposition: That a lien creditor, having elected to enforce his claim by taking judgment, and causing the land subject to the lien to be sold generally, and without reservation, as the property of the debtor, will be estopped thereafter from denying that the complete title was in the execution defendant at the time of the sale, and estopped

from again subjecting it to sale for any unsatisfied portion of his claim. See Rorer on Judicial Sales, § 796; *Freeby v. Tupper*, 15 Ohio, 467; *Fosdick v. Risk*, 15 id. 84; *Simon's Estate*, 19 Penn. 439; *Mahony v. Horan*, 53 Barb. 29.

An examination of these authorities will, we believe, show that the principles therein enunciated have their foundation in the doctrine of estoppel, and rest upon the obvious principle that where a mortgagee or other lien creditor procures the property of his creditor to be sold, and a third person becomes the purchaser, such creditor cannot thereafter assert any title to the property which he held at the time of the sale.

One of the strongest cases cited, and the one most relied on by appellant, is that of *Fosdick v. Risk*.

In that case, the court say: "It would seem that when the mortgagee himself, by his own action, as in the present case, causes the mortgaged premises to be sold, it would be the height of injustice to permit him to pocket the money made by such sale, and still hold on to the premises until he could extort from the purchaser a further sum to relieve the land from his own mortgage."

In order to make that case an authority, in any manner applicable to the one under consideration, a stranger should have been the purchaser at the foreclosure sale, and Black thereafter should have attempted to claim the property by virtue of his deeds from the sheriff in the lien cases. Certainly, in such a case, the law would estop him from extorting money from the purchaser by the practice of any fraud of the kind. But when he purchases the property himself the whole nature of the case is changed, and the authorities relied on are not in point.

It is insisted, however, that Black purchased the lien incumbrances to secure his mortgage; that his mortgage, by its terms, authorized him so to do, and to include in his decree the amount so paid to remove incumbrances for the protection of his mortgage; that the decree includes not only the amount of the note, but also what the mortgagee had been compelled to pay for taxes and to remove incumbrances, and, therefore, that he surrendered his title by virtue of the sheriff's deed in the lien cases, and ought not now to be permitted to assert any interest therein.

That the decree is for a much larger amount than it should have been gives color to this claim. But the averments of the complaint and the findings of the court do not authorize or justify the conclusion that the decree includes any amount paid to remove incumbrances. The complaint does not, by any implication even, aver that any sum whatever had been paid to remove incumbrances or for taxes, but in the prayer of the complaint there is a demand for an accounting to ascertain what had been paid by the mortgagee to protect his mortgage from other liens, and for a sale of the property to satisfy such payments, and the note which the mortgage secured, but no accounting was had, and in the decree the court found only what was due upon the note and mortgage, and ordered a sale of the premises to pay such amount. It seems to us clear from the record what was litigated in the action. But some of the ambiguous and blind averments of the complaint may have justified the court below in hearing proof as to whether the lien incumbrances were included in the amount of the decree, and especially was such proof proper to explain the excess in the decree, and the court, having substantially found, upon the proofs submitted, that such liens were not included therein, we cannot review such action. Even if it had appeared, *prima facie*, that the liens were included in the decree, it would have been proper to have shown by parol testimony that they, in fact, were not so included. Freeman on Judgt. 243, and cases there cited.

Proof having been submitted by both parties upon the trial of this issue, we cannot disturb the findings of the court thereon. Such findings are conclusive upon us. This is an appeal from the judgment. There was no motion for a new trial, and we cannot examine the evidence.

The appellant insists, upon another ground, for reversing the judgment, and it is this: That the decrees in the lien cases, having been entered directly against the property, and providing in the first instance for a sale thereof and not for a judgment, as in ordinary cases, as the statute provides. Therefore the decrees are void.

These decrees for the reasons stated are not void. The most that can be said is, that they were irregular.

The court rendering the decrees had jurisdiction of the person and of the subject-matter, and these conditions conceded, the judgment is not void, however erroneous it may be, and is not subject to attack collaterally. *Moore v. Martin*, 38 Cal. 428; *Chase v. Christianson*, 41 id. 253. There are numerous authorities to the same effect.

It is also claimed that the description of the property in the liens and all subsequent proceedings thereunder, in consequence of such description, are void.

The description is as follows: "The mill, the water right, appurtenances thereto, the mill site and a convenient space around said property, of one acre of ground."

The uncertainty of the description does not invalidate the liens or the decrees founded thereon. In the case of *Tibbetts v. Moore*, 23 Cal. 209, the description of the property in the lien was: "A quartz mill, etc., with such convenient space of land around the same as may be required for the convenient use and occupation thereof." The decree contained this description; and on objection thereto the court says: "In cases of this kind it is proper for the court, by its decree, to define the amount and extent of the land connected with the mill, which is properly subject to the lien. The decree in this case, however, does not do so, and this is also urged as an objection. Such an omission will not invalidate the decree, but renders it doubtful whether the purchaser under it will acquire any land beyond that covered by the buildings." We are only called on to determine whether such description renders a decree containing it, and based thereon, void, and subject thereby to collateral attack. The authorities are conclusive on the question that such description does not render the decree void. See Philipps on Liens, § 388; *Quackenbush v. Carson*, 21 Ill. 99; *Caldwell v. Asbury*, 29 Ind. 451; *Tinker v. Geraghty*, 1 E. D. Smith, 688; *Kennedy v. House*, 41 Penn. 39; *McClintock v. Rush*, 63 id. 203.

The decrees in the lien cases being valid the sales thereunder are good, and Lineberger, the purchaser at such sales, after the time for redemption had expired, was entitled to a writ of assistance to put him in possession of the property. But before the redemption period expired, Lineberger assigned his sheriff's certifi-

rates of sale to Black, and he received the sheriff's deeds of the property sold, and we can see no reason why Black was not thereby entitled to a writ of assistance. His deeds gave him the right of possession. In this respect he was substituted for Lineberger. The petition for the writ is incorrectly entitled, but the facts stated therein make a conclusive case in favor of Black, and show that he, by the assignment of the certificates, had become entitled to all the rights of Lineberger in the sales, and that the sheriff rightly executed to him his deeds for the premises, and in such a case the writ of assistance rightfully issues in favor of the assignee of the purchaser.

The amount of the decree in the foreclosure case is too large by about \$1,500. The error arose in the computation of the interest on the note. Good conscience would demand that this amount be indorsed on the deficiency judgment, and if, in this proceeding, we had the authority to correct the error, we should do so at once; but in this collateral attack on the judgment and decree, our hands are tied. The proper remedy was by appeal in the foreclosure case.

Another reason assigned for asking that the sales in the lien cases be set aside is, that Black, by his representations and statements at the time of such sales, prevented a fair sale from taking place. His statements were as follows: "That he had a lien upon the property and had made a motion in court to set aside the judgment, and if they bought it they did so at their peril."

These statements were in fact true. He had made motions to set aside the judgments; he had a mortgage on the property offered for sale, and any one bidding thereon did so subject to such mortgage. These statements do not seem to have been made to prevent a fair sale of the property, but rather that those proposing to bid thereon might do so understandingly, and statements and representations so made within the truth ought not to disturb the sale.

Judgment affirmed.

WELLS, appellant, v. CLARKSON, respondent.

PRACTICE — *motion for rehearing*. It is not proper practice to present a case as though a rehearing had been granted on a motion for rehearing.

SET-OFF — *unliquidated damages — assignment*. Though a claim for unliquidated damages is not a proper set-off against a claim founded on contract, a judgment in favor of one party is a proper offset against a judgment for damages subsequently obtained by the judgment debtor, and any assignment of such judgment or portion thereof to a third party, after this equitable right has attached, will not be allowed to defeat the same.

Appeal from Third District, Lewis and Clarke County.

THIS was a motion for a rehearing of the case reported *ante*, 230.

W. F. SANDERS and E. W. & J. K. TOOLE, for appellant.

CHUMASERO & CHADWICK, for respondent.

KNOWLES, J. The respondents ask for a rehearing in this case, and on this motion present all the points they would rely upon if a hearing were granted. This is not proper practice. The motion was made at a former term of this court. Upon this application, we are again cited to authorities where the right of set-off was asked on motion.

We announced, in our former opinion, that such cases are not in point. One case cited, namely, that of *Roberts v. Carter*, 38 N. Y. 107, is where a bill in equity was filed to compel a set-off. But it does not meet the question presented in this case. The facts in that case appear from the reported decision to have been that Carter brought an action against Roberts on a contract. Before judgment Carter assigned his claim to one Terry, and on the 23d day of July, 1857, a judgment was entered in favor of Terry in the action. Roberts, at the time of this assignment to Terry, was prosecuting an action against Carter for damages for fraud. The claim of Roberts was for unliquidated damages, at the date of this assignment by Carter to Terry, and hence Roberts, at the date thereof, had no right of set-off, equitable or otherwise,

of a claim for unliquidated damages against a claim on contract, where the damages are liquidated. It was not until sometime after this assignment that Roberts' demand was merged in a judgment, when it would have been the subject of a set-off. Terry then owned the claim, not Carter. Counsel ought to have been able to distinguish between that case and the one at bar. The claim of Wells, Fargo & Co. was one on a contract, and the equitable right, under the circumstances presented in this case, to have their claim set off against that of Clarkson accrued at the date of the rendition of judgment in Clarkson's favor.

The counsel for respondents claim that this court was mistaken as to the facts of the case. They set forth that the assignment to McGregor was not a balance of a judgment, but that the assignment to him was made before Wells, Fargo & Co. paid the sum of \$2,500 to Clarkson. This may be true, but the mistake does not affect the former decision in this case.

It does not appear that Wells, Fargo & Co. had any notice of the assignment to McGregor at the time they paid the money to Clarkson. If they had, there might be some question of fraud upon the rights of McGregor presented in the case; but without such notice, McGregor left Wells, Fargo & Co. in a condition where Clarkson could practice a fraud upon them. The attorneys for respondent, throughout this case, seem to ignore certain facts presented, namely: This is a suit in equity; the insolvency of Clarkson is admitted, the facts that show that McGregor was not a *bona fide* purchaser of one-half of this judgment, or whatever interest he was assignee of, are also admitted, and that he had notice of the equities of Wells, Fargo & Co. when he took the assignment.

We find no reason for disturbing the former rulings and decision of this court in this case.

Motion overruled.

PAYNE, respondent, v. Davis, appellant.

JURISDICTION — *amount of costs.* The amount of the costs forms no part of the matter in dispute when questions of jurisdiction are considered.

SAME — *act restricting appeal void.* The six hundred and seventeenth section of the Civil Practice Act, which provides that the supreme court shall have jurisdiction in civil cases, "where the amount in dispute exceeds \$100," is inconsistent with the ninth section of the Organic Act of the Territory, which allows appeals "in all cases from the final decisions" of the district courts.

STATUTORY CONSTRUCTION — *appeal.* Statutes should be construed liberally to maintain the right of appeal.

PRACTICE — *waiver of irregularities in appeal.* D. recovered a judgment in the probate court against P., who appealed. D. appeared generally at two terms of the district court and made two motions to dismiss the appeal for certain irregularities in the taking of the appeal. The motions were overruled, and D. proceeded voluntarily to a trial upon the merits of the action and P. recovered judgment. *Held*, that D. waived the irregularities in the taking of said appeal.

Appeal from Third District, Lewis and Clarke County.

CHUMASERO & CHADWICK, for the motion to dismiss the appeal.

J. J. WILLIAMS and SHOBER & LOWRY, contra.

BLAKE, J. The respondents have filed a motion to dismiss this appeal because the amount in dispute is less than \$100. The transcript shows that the value of the property involved in the action is \$50, and that the costs exceed \$80. In considering questions of jurisdiction, the amount of the costs forms no part of the matter in dispute and cannot be regarded in determining this motion. *Bolton v. Landers*, 27 Cal. 106; *Walker v. United States*, 4 Wall. 164.

The respondents rely upon the following section, which provides that this court "shall have appellate jurisdiction in all civil cases where the amount in dispute exceeds \$100." Civ. Pr. Act, § 617. There are other sections of the same act which provide that appeals may be taken from all final judgments in civil actions, and no limitations are placed upon the amount in controversy. *Id.*, §§ 369, 380, 392. The Organic Act contains this clause:

"Appeals shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law." § 9. Under this provision, the legislative assembly has the power to define the mode and manner of the proceedings by which appeals can be taken to this court. But it has no authority to limit the appellate jurisdiction of this court and deprive any party of his right to be heard on appeal in any case. In *Ferris v. Higley*, 20 Wall. 383, Mr. Justice MILLER delivered the opinion and said: "But we hold that the acts of the legislature are not the only law to which we must look for the powers of any of these Territorial courts. The general history of our jurisprudence and the Organic Act itself are also to be considered, and any act of the Territorial legislature inconsistent with the latter must be held void." The part of said six hundred and seventeenth section, which relates to the "amount in dispute," is in conflict with the Organic Act and must be treated as a nullity. The other sections of the Civil Practice Act, *supra*, are in harmony with the Organic Act, and must be enforced. Statutes must be so construed as to maintain the right of appeal, if the established rules of interpretation are not violated. *Appeal of Houghton*, 42 Cal. 45.

Motion overruled.

The appeal was then heard upon its merits.

WADE, J., decided the motions referred to in the opinion and tried the action with a jury.

J. J. WILLIAMS and SHOBER & LOWRY, for appellant.

Appellant's motion to dismiss the appeal from the probate court should have been sustained. The undertaking had one surety. The statute requires two. Sts. 8th Sess. 50, § 5. The notice of appeal was not served. The undertaking was not filed within the time prescribed by law. No appeal from the probate court was perfected and the district court did not have jurisdiction of the case. *Bryan v. Berry*, 8 Cal. 133; *Franklin v. Reiner*, id. 340; *Whippley v. Mills*, 9 id. 641; *Hastings v. Halleck*, 10 id. 31; *Elliott v. Chapman*, 15 id. 383; Cod. Sts. 117, §§ 411, 412.

To render an appeal effectual for any purpose, the statute must be strictly complied with. No undertaking was ever filed.

CHUMASERO & CHADWICK, for respondent.

Appellants made a general appearance at the May term of the district court and thereby waived the alleged irregularities in the taking of the appeal from the probate court. The object of the appeal was accomplished when appellants appeared by their attorney in the court below. *McLeran v. Shartzer*, 5 Cal. 70; *Mathoney v. Middleton*, 41 id. 51; *Shields v. Thomas*, 18 How. (U. S.) 258; *Miller's Pl. & Pr.* 169-171; *Carpentier v. Minturn*, 65 Barb. 294; *Seymour v. Judd*, 2 N. Y. 464.

Appellants could not renew their motion at the November term without leave of court. *Wait's Code*, 760, and cases cited. Appellants' motions to dismiss were irregular in form and ambiguous and uncertain.

An appeal bond may be amended, if defective. *Bornheim v. Baldwin*, 38 Cal. 671; *Coulter v. Stark*, 7 id. 244.

BLAKE, J. This action was brought and tried in the probate court of Lewis and Clarke county, and the appellants recovered judgment. A notice of appeal from this judgment was filed by the respondents June 2, 1874, but not served upon the appellants. An undertaking with one surety was given at the same time, which was approved by the probate judge November 4, 1874. Subsequently the transcript and other papers were delivered to the clerk of the district court. The appellants appeared generally at the May term, 1875, and made an oral motion to dismiss the appeal for two reasons: That no notice of appeal had been served upon them, and that the undertaking on appeal had not been perfected within the time required by law. The motion was denied, and a written motion of the same character was filed and overruled at the following term in November. This was entered in the "motion book," and assigned only one ground, that the appeal "is not perfected according to law." Afterward, at the same term, the action was tried by a jury by the agreement of the parties and a judgment was entered on the verdict for the respondents.

The action of the court in refusing to dismiss the appeal from the probate court is the only error of which the appellants complain.

We think that the appellants waived the irregularities of the respondents in the taking of their appeal from the probate court by proceeding to a trial in the court below. The appellants made a general appearance at two terms of the district court and submitted the case to the jury without making any objection, or taking an appeal from the orders overruling their motions to dismiss the appeal from the probate court. In *McLeran v. Shartzer*, 5 Cal. 70, Mr. Justice HEYDENFELDT says: "It is unnecessary to decide whether the notice of appeal was in conformity with the statute. We have often determined that where the object of notice was accomplished it is immaterial whether there was notice or not. Where both parties appear, no notice whatever is necessary to be shown." The same principle is decisive of the objections of the appellants to the undertaking. When the appeal is taken *bona fide*, and not for delay, the appellate court will permit another undertaking to be filed in lieu of one which is defective. *Coulter v. Stark*, 7 Cal. 245.

We will take another view of the case. Have the appellants waived any rights in the court below? It has been held, that, on the motion for a new trial, the filing of a counter statement is a waiver of objections to the want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76. A judgment by default is waived by an attorney, who accepts service of a demurrer after the default has been taken. *Hestres v. Clements*, 21 Cal. 425. In *Gale v. Tuolumne W. Co.*, 14 Cal. 25, no answer to the complaint was filed, and the plaintiffs went to trial without asking for a judgment by default for the failure to answer. When the plaintiffs complained of this error on the appeal, the court said that "they took the chances, and if they had succeeded the defendants could not have objected to the result, and when they fail they must abide the judgment." The appellants took the chances in gambling for a verdict and failed, and cannot now take advantage of the irregularities which have been mentioned. *Warren v. Glynn*, 37 N. H. 340; *Richmond v. Tallmadge*, 16 Johns. 307. They do not attack the judgment, which has been rendered against them, and it is affirmed.

Judgment affirmed.

DEMERS, respondent, v. CLEMENS, appellant.

DEFENSE It is a good defense, in an action on a replevin bond, to recover the value of property replevied in default of its return, to show that the plaintiff had taken such property into his possession by other process prior to judgment in the replevin suit. A plaintiff cannot have the property and a judgment against the sureties for its value at the same time.

Appeal from Second District, Missoula County.

W. J. McCORMICK and W. J. STEPHENS, for appellants.

The answer was relevant and sufficient, and the demurrer should have been overruled. *Caldwell v. Gans*, 1 Mon. 576.

A. E. MAYHEW, for respondent.

The defendants were bound absolutely by the recitals in the undertaking. Being given under the statute, the law imports a good consideration besides the retention of the property. The defense might have been good if interposed in the replevin suit; but defendants cannot avail themselves of it in an action on the undertaking. The judgment in the replevin suit is *res adjudicata* as to all such matters. *Lomme v. Sweeney*, 1 Mon. 584.

WADE, C. J. This is an action upon an undertaking executed by defendants in a suit by plaintiff against one Harding, upon claim and delivery of personal property under the statute. There was a judgment for the plaintiff for a return of the property, or for \$324.90, its value, in case a return could not be had. The property was not returned, and execution for its value was not satisfied.

The defendants, in their answer, as a defense, allege that after the execution of the undertaking sued on, and prior to the judgment for plaintiff in the action for claim and delivery, plaintiff commenced an action in a justice's court in Frenchtown, Missoula county, on a demand arising upon contract for \$99, and recovered a judgment thereon; that, by virtue of an attachment and execution, the plaintiff took from the defendants' possession all the property described in plaintiff's complaint herein, except 480 bushels of wheat, and never returned the same. Also, that

the plaintiff took and carried away from the defendants' possession said 480 bushels of wheat.

There was a demurrer to the answer, which was sustained, and, the defendants electing to abide by their answer, judgment was rendered for plaintiff for \$324.90 and interest.

The defendants seem to have held the property as security for having signed the undertaking for its return, if return should be adjudged.

But the plaintiff by his own act, and without the aid of legal process, as to a large portion of the property, takes and carries it away from the defendants' possession, and thereby makes a return thereof by the defendants impossible. But the purposes of the undertaking having been fulfilled, and the plaintiff, having taken the property into his own possession, cannot now sue and recover a judgment against the sureties on the undertaking, because they have failed to return the property. The plaintiff cannot have the property and a judgment against the sureties for its value.

This case comes within the principle decided by this court in the case of *Caldwell v. Gans*, 1 Mon. 570, to which we refer for a further discussion of the question. The answer contained a good defense to the action, and the demurrer should have been overruled.

Judgment reversed and cause remanded.

CREIGHTON, appellant, v. HERSHFIELD, respondent.

CASE OVERRULED. The case of *Creighton v. Hershfield*, 1 Mon. 639, holding that the Civil Practice Act of Montana did not apply to equity cases, overruled. That decision was based on the case of *Dunphy v. Kleinschmidt*, 11 Wall. 614, which was reversed in the case of *Hornbuckle v. Toombs*, 18 id. 648, and *Hershfield v. Griffith*, id. 657.

UNDERTAKING ON APPEAL—*docketing, a ministerial act—its purpose.* Another ruling in the same case, 1 Mon. 639, to the effect that a deficiency judgment should be provided for in the decree and afterward entered and docketed in order to sustain an action on an undertaking to pay any deficiency on sale of mortgaged premises, given on appeal, is also overruled.

That decision was based on the case of *Orchard v. Hughes*, 1 Wall. 77, and on rule 96 of the United States supreme court, of which the former was reversed and the latter became inoperative. The law requires a deficiency on the sale of mortgaged premises to be docketed, to become a lien and notify third parties. A decree need not contain what the law requires to be done without it, and the act of the clerk in such cases is in no sense a judgment, nor is it final or decisive.

Appeal from Third District, Lewis and Clarke County.

THIS is a rehearing of the case reported *ante*, 169.

JOHNSTON & TOOLE, for appellant.

CHUMASERO & CHADWICK, for respondent.

KNOWLES, J. This case is presented to this court at this time on a motion for a rehearing, and the parties have without objection pursued the practice that has heretofore been reluctantly permitted, of presenting in such motion the whole case, as though a rehearing had been granted. A rule of this court adopted at this term will prevent such practice in the future. This case was considered at the August term of this court for 1872, and the opinion then rendered appears in 1 Mon. 641. The facts of the case appear fully in that opinion, and will not be set forth in this. The opinion referred to was based, in the main, upon the opinion of the supreme court of the United States in *Dunphy v. Kleinschmidt*, 11 Wall. 614. That court being the appellate court of this, the ruling of that court in the case controlled this, and in obedience to what we conceived to be the judicial principles therein enunciated, we held the judgment and decree in the case of *Griffith & Thompson v. Herman and Star et al.*, in which the undertaking under consideration in this action was executed, void and of no effect. Fortunately for the happiness and peace of mind of the judicial officers of this Territory, and for the stability and security of the title of property acquired through judicial and execution sales therein, that case was reversed in *Hornbuckle v. Toombs*, 18 Wall. 648. And in the case of *Hershfield v. Griffith*, *id.* 657, in accordance with the views expressed in the case of *Hornbuckle v. Toombs*, that court held the decree in the above-named case of *Griffith & Thompson*

v. *Star et al.* valid. The change of views and the rulings of that court make it a necessity that we should take a new position, and hold that the rulings formerly expressed by us in this case, as to the validity of the judgment and decree in the said case of *Griffith & Thompson v. Star et al.*, should be reversed. Taking as a basis that the decree in that case was correct, we are confronted with another ruling made in this case. Although the undertaking provided for the payment of any deficiency that might arise upon the sale of the mortgaged premises, no judgment or decree for a deficiency was awarded in said decree, or docketed by the clerk, and no action would lie upon this undertaking. As appears from the former opinion in this case, such ruling was based principally upon that of the supreme court of the United States in *Orchard v. Hughes*, 1 Wall. 77, and rule 96 of that court. It was held by this court that such decision and rule in all equity cases, in the main, forced us into the chancery practice that prevailed in the Federal courts, and to a great extent made our Code in equity cases inoperative. There is nothing that appears in the reported decisions of *Orchard v. Hughes* that could lead this court to infer that such case was brought in one of the district courts for the Territory of Nebraska, exercising other than its ordinary chancery jurisdiction conferred by the ninth section of its Organic Act, which is identical with the same section of our own Organic Act. And the rule referred to is general. In its terms it applies to all equity cases in the Territorial courts, and not especially to those that appeal to the jurisdiction of those courts when exercising the jurisdiction of the district and circuit courts of the United States. Under this decision and rule it was our opinion that the decree should provide for the entering up of a decree for a deficiency, and in accordance with section 295 of our Practice Act, the clerk should docket the same upon the return of the sheriff. Before there would be or could be any deficiency to meet the condition in the recognizance for the payment of a deficiency. As there was no provision in the decree of *Griffith & Thompson v. Star et al.* for a decree for a deficiency, we said: "We are not called upon to create a condition and then to assign a breach of the undertaking for a violation thereof." Most happily, this case of *Orchard v. Hughes* followed the fate of the case of *Dunphy v. Kleinschmidt*,

and much to our relief and the satisfaction of the legal profession, we believe, throughout this Territory, was reversed by the learned and justly distinguished court that rendered it, and rule 96 of said court thereby became inoperative. And we find ourselves, after great anxiety, confronted only by the provisions of the Civil Practice Act of this Territory in the consideration of the questions presented to us in this case before us. The point we are called upon to decide is this: Are the defendants liable on their undertaking sued upon in this case, considering its provisions and the fact that the clerk docketed no deficiency judgment after the sale of the mortgaged premises, and the return of the sheriff in the case of *Griffith & Thompson v. Star et al.*? The condition of this undertaking is, "that Hershfield and Hanauer should commit no waste, or suffer any to be committed in said premises, and pay any deficiency arising in the sale of the mortgaged premises, and all damages and costs which might be awarded on appeal." This undertaking was for the payment of any deficiency arising on the sale of the mortgaged premises. Is there no deficiency that can be so considered until the clerk has docketed a deficiency judgment? Under the Civil Practice Act in California prior to 1861, at which date it was amended, the plaintiff, in an action to foreclose a mortgage, could take a personal judgment against the mortgagee, and the decree would be for an order of sale to sell the mortgaged premises and apply the proceeds of such sale to satisfy this personal judgment. The return of the sale of the sheriff was treated as a return of that officer in a sale under an execution. And the judgment throughout was treated as an ordinary personal judgment, save that it might be satisfied by the sale of the mortgaged premises. The cases of *Rollins v. Forbes*, 10 Cal. 299, and *Englund v. Lewis*, 25 id. 337, fully support these views.

In 1861 the amendment to the California Practice Act made it identical with our own, upon the subject of the foreclosure of mortgages. Probably our statute upon this subject was copied from the statutes of that State. The California authorities consider that this amendment upon this subject had only this effect: There could be no lien upon real estate under this personal judgment in a mortgage foreclosure action until a judgment for a deficiency was docketed by the clerk. *Culver v. Rogers*, 28 Cal.

520 ; *Bowers v. Crary*, 30 id. 621 ; *Leviston v. Swan*, 33 id. 480. Under these decisions, there can be no doubt but that in California, under its Civil Practice Act as it now stands, it is still proper, as under the practice before this amendment, to enter a personal judgment, in actions for the foreclosure of a mortgage, and then decree a sale of the mortgaged premises to satisfy this judgment. In fact, it is considered there the better practice. We have borrowed so much from the civil practice that prevails in California that, unless there are insuperable obstacles, it is better that we should follow the decisions of the courts of that State in regard thereto. There are many practical results to be deduced in following the practice of their courts in relation to the action for the foreclosure of mortgages that it is not necessary that we should now refer to. In considering the provisions of our statute upon the subject of the foreclosure of mortgages, we find no objections to following the practice in regard thereto that prevails in California. If the question were a new one we should, in the main, hold, that the *practice* that prevails there was correct. The object of having a clerk docket a judgment for a deficiency being that the judgment for this amount might become a lien upon real estate, and for the further purpose of apprising purchasers of such estate of the amount of the lien thereon. It follows, that the failure of the clerk so to do was no dereliction of duty of which the defendants in this action can complain. This provision of the statute was not made for their benefit. From an inspection of the statutes, we find that it was not necessary that the decree should contain a provision ordering the clerk to docket a judgment for a deficiency. The law requires this, and we have seen what was the object therefor. The clerk does not enter a judgment for a deficiency. He docket it. The court enters the judgment, and the clerk does the ministerial act of docketing a judgment for a deficiency. The defendants undertook to pay any deficiency, after the sale of the mortgaged premises, that might remain on the personal judgment entered in the action of *Griffith & Thompson v. Star et al.*, and not any judgment for a deficiency that the clerk might docket. The real question in such an action as this is: How much of a deficiency is there, and how much of the judgment entered in the case remains unpaid by the sale of

the mortgaged property? And the clerk, acting only in a ministerial capacity in docketing this judgment, and his acts being in no sense an adjudication, it follows that the parties could go behind even this to determine what the deficiency was. We hold, then, that, although no judgment for deficiency was docketed in this case, the action would lie on this undertaking. The judgment in the case of *Griffith & Thompson v. Star et al.* was a personal one, with a decree for the sale of the mortgaged property to satisfy the same. The defendants herein urge that Hershfield and Hanauer, being only interveners, were not required to give such an undertaking as this. This may be so. But they did give it, and this is what the court below found was its effect: "Finding *fifth*. That, in consideration of said appeal and the staying of said sale, said defendants gave the undertaking sued on for the payment of any deficiency growing out of said judgment and sale. Finding *sixth*. That the said sale was stayed until after the *remittitur* was received from the supreme court, and execution upon said judgment."

Now, as to the fact that the defendants Hershfield and Hanauer were not required to give this undertaking, they had the right, being creditors of Herman & Star, to contest the validity of the judgment against them. For all that this court may know, they so intended at the time they took this appeal. They put themselves in a condition to contest it. Their undertaking was sufficient.

The ninth finding of the court was as follows: "That after deducting the proceeds of said sale from said judgment and decree, the deficiency amounts to the sum \$3,477.75." The undertaking stayed the sale, and this was the deficiency arising thereon.

The respondents maintain that they appealed from a portion of the judgment in the case of *Griffith & Thompson v. Star et al.* and that, in accordance with the decisions of this court in the case of *Barkley v. Logan*, *ante*, 296, the court had no jurisdiction of the appeal, and that the undertaking on that appeal was useless and void. Without stopping to discuss the effect of that decision, if the facts were as claimed by respondents, let us see what the decision was in that case. The notice of appeal read as follows:

"Take notice that the above-named interveners, Lewis H. Hershfield and A. Hanauer, hereby appeal to the supreme court of Montana Territory from the judgment or decree in this cause, and filed on the 16th day of May, A. D. 1873; that the appeal is taken from the judgment of the court giving priority to the claim of said plaintiffs over the claim of the interveners, and for not giving such priority to the claim of such interveners."

Now, there is nothing in any part of this notice that shows that an appeal was taken from a part of a judgment. The first part of the notice points out distinctly that the appeal is from the judgment, and the second part does not say that the appeal is from that part of the judgment awarding priority, but from the judgment awarding priority. This is only descriptive of a judgment. There was but one judgment in that case, so far as we are advised by the record. The appeal was from the judgment, and not from a part of it.

The order of this court is, that the former order in this case in this court be set aside; that the order of the court below granting a new trial be, and the same is hereby reversed and set aside, and the cause remanded for further proceedings.

Judgment reversed.

BLAKE, J., being disqualified, did not sit in the above case.

TERRITORY, appellant, v. FLOWERS, respondent.

APPEAL BY TERRITORY IN CRIMINAL CASE. A demurrer to the indictment in this action was sustained on the ground that the court did not have jurisdiction of the offense, and the Territory appealed. The three hundred and ninety-fifth section of the Criminal Practice Act provides that the Territory can appeal when judgment is rendered for the defendant in quashing or setting aside an indictment. *Held*, that this appeal has been properly taken by the Territory.

STATUTORY CONSTRUCTION — *time for appealing and filing transcript in criminal case.* The notice of appeal was filed and served October 10, 1874, and the transcript was filed in this court December 28, 1874. The three hundred and ninety-sixth section of the Criminal Practice Act provides that

“the transcript must be filed within thirty days after the appeal is taken.” *Held*, that this statute is directory, and that the delay of the Territory in filing the transcript does not authorize this court to dismiss this appeal.

Appeal from First District, Jefferson County.

JOHNSTON & TOOLE, for the motion to dismiss the appeal.

J. G. SPRATT, District Attorney, First District, contra.

BLAKE, J. This case is before us upon the motion of the respondents to dismiss the appeal because the same cannot be, and has not been, taken under the laws of the Territory. The grand jury of Jefferson county presented an indictment in open court October 7, 1874, charging the respondents with the commission of the crime of assault and battery. A demurrer to the indictment on the ground that the court did not have jurisdiction of the offense was sustained, and judgment was entered that the respondents be discharged. We are of the opinion that this appeal has been properly taken under the Criminal Practice Act, which allows the Territory to appeal when judgment is rendered for the defendant in quashing or setting aside an indictment. Cr. Pr. Act, § 395.

The notice of appeal was filed and served October 10, 1874, and the transcript was filed in this court December 28, 1874. The law provides that “the appeal must be taken within six months after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken.” Cr. Pr. Act, § 396. The transcript was not filed within the time specified in this section, and the respondents insist that the statute is mandatory. We think that the courts recognize a distinction in this matter. The appeal must be taken within six months after the judgment is rendered, but the language relating to the filing of the transcript is directory. No penalty is attached to a failure upon the part of the appellant to file the transcript within the period fixed by law. The rights of the respondents have not been impaired by the delay complained of. In *Wood v. Fobes*, 5 Cal. 62, Mr. Justice BRYAN says: “This court has always held that statutes fixing the time for filing papers in a cause are merely directory.”

The same view is supported by the following authorities. Sedgwick's Stat. Law, 368, 372; *Shaw v. Randall*, 15 Cal. 384; *People v. Lake County*, 33 id. 487; *McQuillan v. Donahue*, 49 id. 157; *State v. Baker*, 8 Nev. 141.

This is the first case in which this court has passed upon this question, but the subject has been referred to in other causes in which the decisions were based upon different grounds. *Territory v. Fallis*, ante, 236; *United States v. McElroy*, ante, 237.

The motion is overruled.

DAVIS, appellant, v. CLARK, respondent.

EJECTMENT — *seisin* — possession. In actions of ejectment the plaintiff must prove that he is seised of the premises, or some estate therein. In the absence of adverse possession, the right of possession follows the seisin in law.

STATUTORY CONSTRUCTION — *limitations* — *quartz lodes*. The amendments to the statute of limitations, approved January 11, 1872, changed the order and character of the evidence in actions for the recovery of claims upon quartz lodes; and the plaintiff must show that he was in the actual possession of the same within one year next before the commencement of the action.

Appeal from Second District, Deer Lodge County.

THIS was a rehearing of the case reported ante, 310.

J. C. ROBINSON and CHUMASERO & CHADWICK, for appellant.

The appellant made out a *prima facie* case. Having proved the location of the mining ground and the conveyance to him, the law presumes a continuing title until the contrary is proved. Tyler on Ejectment, 540, 541, 761, 765; *Payne v. Treadwell*, 16 Cal. 242; *Haight v. Green*, 19 id. 117; *Lewis v. Goyette*, 3 Stewart & P. 184; *Applegate v. Doe*, 2 Ind. 169; *Doe v. West*, 1 Blackf. 133; *Shuffleton v. Nelson*, 2 Sawyer, 542; 3 Washb. Real Prop. 130; *Currier v. Gale*, 9 Allen, 525; *Fosgate v. Herkimer Co.*, 9 Barb. 287; *Brown v. King*, 5 Metc. 173.

To defeat appellant's title, respondent must prove affirmatively that he had been in the adverse possession of the premises for one year. *Doswell v. De La Lanza*, 20 How. (U. S.) 32.

SHARP & NAPTON, for respondent.

BLAKE, J. This case is before us, upon the motion of the appellant, for a rehearing. In considering the questions which have been submitted, we must be governed by the rule established in *Columbia M. Co. v. Holter*, 1 Mon. 432. The decisions of this court will not be reversed unless they are in conflict with a statute or controlling decision, to which the attention of the court has not been directed, or it appears that some question, which is decisive of the case, has been submitted by counsel and been overlooked by the court. At this time we can examine only one proposition that has been discussed by the appellant.

It is maintained that he made out a *prima facie* case by proving the location and pre-emption of the mining ground in dispute, and the conveyance of the same to him by its locators and preemptors; that the law presumes a continuing title and possession, and that it was necessary for the respondent to show that he had been in the adverse possession of the property for the period of one year. In actions of ejectment the courts hold that it is sufficient for the plaintiff to aver that he is seised of the premises or some estate therein, and the right of possession follows as a legal conclusion from the seisin. "If seisin is once proved, it will be presumed to continue until the contrary is shown." *Currier v. Gale*, 9 Allen, 525; *Brown v. King*, 5 Metc. 173; *Payne v. Treadwell*, 16 Cal. 244; 3 Washb. Real Prop. 130, and cases there cited. "In the absence of adverse possession, seisin follows the legal title, and seisin in law carries with it the legal possession." *Furwell v. Rogers*, 99 Mass. 33, and cases there cited. It must be conceded that these authorities would be decisive in this case, if the statutes, which are cited and commented upon in the opinion delivered at the first hearing of this appeal, had not been enacted.

Did this court state correctly the effect of the amendments to the statute of limitations, approved January 11, 1872? Cod. Sta.

591. The language of the law is plain and unambiguous, and there is no room for construction. *United States v. Fisher*, 2 Cranch, 399; *Smith v. Williams*, ante, 195. We can apply Lord COKE's rule and consider the previous state of the law, and the mischief which the statute was passed to obviate. Sedgw. on Stat. Law, 235. Before the adoption of these amendments by the legislative assembly, the title to many of the quartz lodes within the Territory was based upon the notice of the pre-emption or discovery, which had been filed in the office of the county recorder. No work was required to be performed to hold the property, and the means of defining the extent of the mining claims were imperfect and uncertain. The doctrine of the authorities referred to was recognized by our courts, and the law presumed that the person having the record title had the possession of the lode. These amendments were passed to obviate the mischief resulting from the enforcement of this rule, and the nature of the testimony required in actions for the recovery of property of this character was changed. The plaintiff in such a case is compelled to prove that he or his assigns, or predecessors in interest, was in the actual seisin or possession of the lode claim within one year next before the commencement of the action, and the legal presumption of such possession has been rendered insufficient. Courts have no power to modify this statute by the exercise of a sound discretion. The appellant failed to comply with this act in the introduction of his evidence, and the motion for a rehearing must be denied.

Rehearing denied.

UNITED STATES, respondent, v. ENSIGN, appellant.

TERRITORIAL LEGISLATURE — *powers — limitations — case affirmed.* The Organic Act that confers upon the district courts common-law and chancery jurisdiction, and also the jurisdiction exercised by the United States circuit and district courts, provides that this jurisdiction, in all alike, shall be as limited by law. This limitation may extend to the *modes of exercising* this jurisdiction, and applies to all branches of that jurisdiction. *Case of Gallagher v. Basey*, 1 Mon. 457, affirmed.

PRACTICE — *common-law forms* — *scire facias* — *complaint*. The Civil Practice Act applies as well to cases in which the district court exercises the jurisdiction of the United States circuit and district courts, and in which the United States is a party. The common-law forms of procedure, including *scire facias*, are done away, and a complaint is necessary in all civil actions.

UNDERTAKING — *a civil action*. The action on a forfeited undertaking, though given to secure appearance in a criminal case, is itself a civil action on a contract with liquidated damages.

Appeal from Second District, Deer Lodge County.

CHUMASERO & CHADWICK, for appellants.

MERRITT C. PAGE, United States Attorney, for respondent.

The judgment at the April term was rendered in accordance with the practice in such cases, and is good and sufficient in law.

The theory of the common law is, that the rendition of a judgment is the act of the law, not of the court. Freeman on Judgments, 546.

The journal entry shows that the plaintiff was entitled to judgment, and that it was the intention of the court to give effect to the law. Nothing more was needed.

No particular formula of words are necessary to constitute a valid judgment. Defects in phraseology, or the failure to employ the terms in common use in such cases, cannot operate to render the judgment a nullity. Freeman on Judgments, § 47.

WADE, C. J. This is an action upon an undertaking.

The facts are as follows: At the September term, 1873, of the district court within and for the county of Deer Lodge, sitting to hear and determine causes arising under the constitution and laws of the United States, an indictment was found against the defendant Ensign and others, charging them with a conspiracy to defraud the United States. Thereupon, on the 31st day of December, 1873, Ensign filed with the clerk of the court a bond conditioned for his appearance at the ensuing April term of the court to answer such charge, in the sum of \$2,500, with Largey and Carroll as sureties thereon. At the ensuing term Ensign did not appear, and his undertaking was adjudged forfeited, and the cause contin

ued until the next term. On the 27th day of April, 1874, a *scire facias* was issued by the clerk of the court setting forth the finding of the indictment, the execution of the undertaking, the forfeiture of the same, the liability of the sureties thereon, and an order upon the defendants to appear at the September term, 1874, of the court, to show cause why the United States should not have execution against them for the amount of such undertaking, if they desired so to do, which writ was served upon the defendant Carroll on the 8th day of May, 1874, and on the defendant Largey on the 7th day of September, 1874. Afterward, on the 10th day of September, 1874, at the September term of the court, the United States attorney moved for a judgment against the defendants, which motion was granted, and judgment entered for the sum of \$2,500, the amount of the undertaking, to which the defendants duly excepted and filed their bill of exceptions, and from the judgment appealed to this court.

Upon this statement of facts was the judgment regularly and duly obtained? By the execution of the undertaking and the forfeiture thereof, a right of action accrued to the United States, in an action arising under the laws of the United States. In the prosecution of this right the practice of the common law was adopted, and a *scire facias* issued. This writ, when it is applicable and the proper remedy, is a pleading. It takes the place of a declaration or complaint, and may be demurred to for insufficiency or otherwise, or answered, and an issue formed as in other cases. But under the Practice Act of the Territory this writ is not the proper method of commencing an action. Section "1" of that act provides, "there shall be in this Territory but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs, which shall be the same at law and in equity." Section 28 provides, that civil actions in the district courts "shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, and the issuing of a summons thereon." In the case before us no complaint was filed and no summons issued. Clearly the provisions of the Practice Act were disregarded in the prosecution of the action, and the question is presented whether or not the pro-

visions of that act are applicable to a case of this kind arising under the laws of the United States.

1. This is a civil action, and what follows is said in relation to civil actions. It is prosecuted by the plaintiff to recover the amount of an undertaking and promise made by the defendants. The fact that the undertaking was given to secure the appearance of Ensign to answer a criminal charge does not make it a criminal action, or in the nature of one. It is an action on a contract with liquidated damages.

2. When the United States comes into the district courts of the Territory, while sitting in their capacity of, and clothed with the jurisdiction of circuit and district courts of the United States, to enforce a civil right arising under the constitution and laws of the United States, must they conform to the practice of the Territorial courts? Or, in such cases, do the practice and mode of proceedings in the United States courts take the place of and supplant our Civil Practice Act?

What is the power of the legislature of the Territory to regulate the exercise of the jurisdiction of the district courts? The Organic Act authorizes and provides for a legislature, and gives it authority to legislate upon all rightful subjects of legislation. Was the adoption of the Civil Practice Act within the legitimate scope of legislative authority, and if so, to what extent does it regulate the practice of the district courts while sitting to hear civil causes arising under the constitution and laws of the United States? In *Clinton v. Englebrecht*, 13 Wall. 441, Chief Justice CHASE discusses the powers of Territorial legislatures under Organic Acts like our own, and says: "The theory upon which the various governments for portions of the Territory of the United States have been organized has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority and with certain fundamental principles established by congress. As early as 1784 an ordinance was adopted by the congress of the confederation, providing for the division of all the Territory ceded or to be ceded, into States, with boundaries ascertained by the ordinance. These States were severally authorized to adopt for their temporary government the constitution and laws of any one of the States, and

provisor was made for their ultimate admission, by delegates into the congress of the United States. We thus find the first plan for the establishment of governments in the Territories authorized the adoption of State governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the State constitution originally adopted by them. This ordinance applying to all the Territories ceded or to be ceded, was superseded three years later by the ordinance of 1787, restricted in its application to the Territory north-west of the river Ohio, the only Territory which had then been actually ceded to the United States."

After speaking of the organization of the Territorial governments since the ordinance of 1787, he continues: "In all the Territories full power was given to the legislature over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all." In that case the court was testing the validity of the statute of the Territorial legislature of the Territory of Utah respecting the impaneling of jurors. And the question was whether such statute came within the scope and meaning of a provision of the Organic Act of that Territory, which is the same as that of our own, providing that the legislative power of the Territory shall extend to all rightful subjects of legislation, and the statute was held valid for the reason that the legislature in enacting it had not transcended its authority.

The logical sequence deducible from this decision is, that a Territorial legislature clothed with the authority of our own under the Organic Act, has the rightful authority to enact a Code of Civil Procedure, and to prescribe the forms of actions and modes of practice in the Territorial courts.

Certainly if it can regulate the manner of impaneling juries it can provide how actions shall be commenced and prosecuted, and the form and mode of proceeding therein. In *Hornbuckle v. Toombs*, 18 Wall. 656, the supreme court of the United States says: "From a review of the entire past legislation of congress on the subject under consideration, our conclusion is that the practice, pleadings and forms and modes of proceeding of the Territorial courts, as well as their respective jurisdictions, subject.

as before said, to a few express or implied conditions in the Organic Act itself, were intended to be left to the legislative action of the Territorial assemblies, and to the regulations which might be adopted by the courts themselves."

We conclude then that our legislature did not overstep its authority in enacting and adopting the Code of Civil Procedure.

It remains to ascertain to what extent the Code thus established and the practice thereunder apply in the Territorial district courts, when sitting to hear and determine civil causes, arising under the constitution and laws of the United States. Our district courts are, by the Organic Act, given common-law and chancery jurisdiction, and also the jurisdiction exercised by the circuit and district courts of the United States, and that such jurisdiction shall be as limited by law.

This term "as limited by law" applies as well to the common-law jurisdiction as to district and circuit court jurisdiction conferred upon our Territorial district court. The Organic Act makes no distinction as to these several jurisdictions, and qualifies each of them by providing that they shall be as limited by law.

It is necessary to determine the meaning of this limitation. This we have done in *Gallagher v. Basey*, 1 Mon. 462, where it is held, the meaning of the phrase "as limited by law" (as used in the ninth section of the Organic Act) is "that the mode and manner of proceedings may be controlled and governed by law." Not that the legislature may enlarge or contract such jurisdiction. Not that the common-law or chancery jurisdiction can be taken away. Not that the right of our Territorial district courts to exercise the joint jurisdiction of the district and circuit courts of the United States can be interfered with or disturbed, but that the mode of exercising this jurisdiction may be regulated by law. The legislature, having attempted to regulate the practice in the Territorial district courts, by the adoption of the Code, and having the authority under the Organic Act thus to legislate and to regulate the practice in such courts, the practice thus established must apply to the several jurisdictions conferred on said courts. The meaning of the Organic Act is not that the legislature may regulate the practice in common-law cases "alone," but as to the whole civil jurisdiction, and extending to those cases arising under

the constitution and laws of the United States it may establish the forms and modes of practice. There is nothing in the Organic Act to show that the right to regulate the practice in the district courts of the Territory by the legislature is limited to any particular branch of the jurisdiction of such courts, and the grant of power being general the practice established by the Code of Civil Procedure must be held to apply to and regulate the mode of proceeding when the district courts of the Territory are exercising any of the several civil jurisdictions upon them conferred by the Organic Act.

Adopting this view of the law the several district courts of the Territory have by rule provided that in all civil causes arising under the constitution and laws of the United States, the Territorial Practice Act shall prevail. We think the rule authorized and required by law. It follows that the judgment in this action was not duly obtained. There was no complaint and no summons in the case. The requirements of the Practice Act were not complied with. A suit on an undertaking and in this Territory cannot be commenced by *scire facias*. The forfeiture of the undertaking fixes the liability of the sureties, and only that. When so fixed an action may be instituted on the undertaking, and a summons issued as in other cases. In this regard the same practice should prevail when the United States is plaintiff, as if the Territory or a private person instituted the action.

So also if the action arose under the constitution or laws of the United States.

Judgment reversed and cause dismissed.

FOOTE, appellant, v. NATIONAL MINING Co., respondent.

CONSTRUCTION OF STATUTE—*width of lead—point of measurement.* The proper construction of the act of the Montana legislature, December 26, 1864, contained in the Codified Statutes, 522, § 3, is that the measurement of the *fifty* feet on either side of the *lead*, allowed for working purposes, should begin from the outer walls of the *lead*, on each side, and not from the center of the *lead* itself.

Appeal from Third District, Lewis and Clarke County.

GEORGE B. FOOTE, in person, appellant.

CHUMASERO & CHADWICK, for respondents.

WADE, C. J. The question presented for our determination in this case relates to the width of a mining lode claim under the act of the legislative assembly of December 26, 1864, which act was in force at the date of the location of the claims in dispute. The respondent maintains that the true construction of the statute authorized the location and pre-emption of fifty feet on each side of the lode, in addition to the width of the lode itself, while the appellant insists that in no case under such statute can a lode claim exceed one hundred feet, and that the fifty feet on each side thereof must be measured from the center of the lode.

The statute in question is as follows: "Sec. 3. Claims on any lead, lode or ledge, either of gold or silver, hereafter discovered, shall consist of not more than two hundred feet along the lead, lode or ledge, together with all dips, spurs and angles emanating or diverging from said lead, lode or ledge, as also *fifty feet on each side* of said lead, lode or ledge for working purposes." Cod. Sts. 522.

The statute seems unambiguous in its terms, and unless its application to its subject-matter renders it doubtful its interpretation will be easy.

Do the words, "Fifty feet on each side of said lead, lode or ledge," mean fifty feet from the center thereof?

In construing this language regard must be had to what in truth a lead or lode is, and when so tested the problem seems easy of solution and free from doubt. A lead or lode is not an imaginary line without dimensions; it is not a thing without shape or form, but before it can legally and rightfully be denominated a lead or lode it must have length and width and depth; it must be capable of measurement; it must occupy defined space and be capable of identification. Before a quartz claim can be legally located, a lead or lode containing gold or silver must be discovered, and before such discovery can be called a discovery, at least one well-defined wall or side to the lode must be found. What then is a quartz

lode? It is a fissure or seam in the country rock filled with quartz matter bearing gold or silver. This fissure may be wide or narrow; it varies in width from one inch, or even less, to one hundred feet, or much more. The sides of a lead are represented and defined by the walls of the country rock, and these walls must be discovered, and the lead identified thereby, before it can be located and held as a lead. Sides or walls then being necessary to a lead, it follows that a statute giving to the locator fifty feet on each side of a lead for working purposes, must be construed to mean fifty feet from each wall or side of the lead. The fifty feet on each side cannot include any of the lead. If the lead is ten feet wide the location may be one hundred and ten feet in width, being fifty feet on each side of the ten feet occupied by the lead. There is nothing in the statute to require or to warrant the measurement of the fifty feet, to commence at the center of the lead; whether it be wide or narrow the discoverer thereof is entitled to his claim thereon, and fifty feet on each side thereof, and if he was confined to fifty feet on each side of the center of the lead, oftentimes it would occur that he could not receive what he is justly entitled to by virtue of his discovery, for it is sometimes the case that a lead is more than one hundred feet in width.

The answer contained no defense to the action of the plaintiff, and judgment was properly rendered for the plaintiff on the pleadings.

Judgment affirmed.

COURTRIGHT, appellant, v. BERKINS, respondent.

APPEAL — *filing and service of notice.* This court does not have jurisdiction of an appeal in which a copy of the notice was served the day before the notice was filed in the district court.

Appeal from First District, Jefferson County.

W. F. SANDERS and CHUMASERO & CHADWICK, for the motion to dismiss the appeal.

JOHNSTON & TOOLE, contra.

BLAKE, J. This appeal must be dismissed for want of jurisdiction. The notice of appeal was filed April 1, 1874, and a copy of the same was served upon the respondents March 31, 1874. The statutes of California and Nevada regulating appeals are the same as those of this Territory. The courts of these States hold that the filing of the notice of appeal must precede or be contemporaneous with the service of the copy thereof to render an appeal effectual. *Hastings v. Halleck*, 10 Cal. 31; *Buffeneau v. Edmondson*, 24 id. 94; *Moulton v. Ellmaker*, 30 id. 527; *Boston v. Haynes*, 31 id. 107; *Foy v. Domec*, 33 id. 317; *Lynch v. Dunn*, 34 id. 518; *Lyon Co. v. Washoe*, 8 Nev. 177.

The failure of the appellants to comply with the Civil Practice Act in this proceeding is an error which affects the jurisdiction of this court. The appellants are charged with the duty of perfecting their appeal, and the record does not show that the respondents have waived any rights in this court.

Appeal dismissed.

WOOLMAN, appellant, v. GARRINGER, respondent.

PRACTICE—*judgment reversed — new trial — special findings.* The entry of judgment in the appellate court as follows: "That the judgment rendered and entered in this cause in the court below be reversed and the cause remanded," does not necessitate that a new trial on the merits shall be had in the court below — the supreme court of the United States having in the meantime reversed their decision upon the main question on which the appeal was sustained, to wit: on the issue that a legal and equitable action could not be combined in one proceeding, and the special findings of the jury in the first trial being unquestioned, and warranting an entry of judgment by the court below without a new trial.

Appeal from Third District, Lewis and Clarke County.

THIS is the same case that was before this court at its August term, 1872, 1 Mon. 535.

E. W. TOOLE and SHOBER & LOWRY, for appellant.

W. F. SANDERS, for respondent.

KNOWLES, J. The facts presented to us in this case, as we gather them from the record, are as follows: The cause was tried in the district court of the third judicial district, in the county of Lewis and Clarke, in the year 1871. Certain special issues were then submitted to a jury impaneled in this cause. The jury found upon these issues, and brought in a general verdict also for plaintiffs for damages. The objects of the action were to recover damages for the wrongful diversion of water, and for an injunction to restrain the defendants from diverting the same. Upon the special findings both plaintiffs and defendants moved for a judgment. The court awarded judgment to the plaintiffs, and the defendants appealed from this judgment to this court, which, upon the hearing of the cause, made this record: "Now on this day, this cause coming on for decision and judgment on appeal, the court rendered its opinion in writing, which was duly filed, and for reasons assigned in said opinion, it is ordered and adjudged here by the court that the judgment rendered and entered in this cause in the court below be reversed and the cause remanded." What was the effect of this order? Did it necessitate a new trial of the cause? The decision of this court, it will be observed, was based upon an inspection of the opinion upon two propositions: First. This was an action in which law and equitable relief were asked, and a law and equitable cause of action united, and this was in violation of our Organic Act. Second. It was found by the jury, and was a conceded fact, that the defendants were the prior appropriators of one thousand inches of the waters of McLellan creek, and that the plaintiffs' rights were based upon the appropriation of this water, after defendants had used it through their ditch, and that as a matter of law under these facts the defendants had the undoubted right to extend their ditch, so as to convey this water to a point where it would not flow into plaintiffs' ditch, and hence the court below ought to have given judgment for the defendants upon these findings.

As to the first proposition the decision of the supreme court of the United States in the case of *Hornbuckle v. Toombs*, 18 Wall. 648, eliminated it from the case. It held that under our Organic Act an equitable and legal cause of action, in certain cases, could be united in the same complaint. This left the opinion of this

court in this case, and the judgment therein, resting for support upon the second proposition only. So when this case came a second time before the district court it was confronted with this decision of the United States supreme court in the case of *Hornbuckle v. Toombs*, which eliminated the first proposition from the case, and was controlling. No one would contend that at that time, in accordance with the former opinion of this court in this case, the court should have held that the cause should not proceed under the complaint in the case, because it contained a legal and equitable cause of action. It was also confronted by the former decision of this court in this case, that under the facts found in the special verdict, judgment should have been for the defendants. The special findings of the jury control the general verdict. See Civil Practice Act, § 215. The facts had been once tried by a jury. Neither party complained of these special findings. The plaintiffs had had their day in court in relation to them. The court below, confronted by these decisions and facts, entered, without a new trial, upon the special findings in the case, judgment for defendants. This is assigned as error.

Upon an inspection of section 378 of our Practice Act, it will be seen that the reversal of a judgment is not always equivalent to an order granting a new trial. When a judgment is reversed a new trial may be ordered when it is proper or necessary. In determining what force and effect is to be attached to a judgment of this court, reversing the judgment of the court below, we may examine the opinion of this court. When fully considered, I think the cases of *Argenti v. The City of San Francisco*, 30 Cal. 458, and *Ryan v. Tomlinson*, 39 id. 639, support this view. There is nothing in the former opinion in this case that can be construed into reversing the judgment for any errors that appeared in the trial of the cause before the jury. It might be construed that the cause was remanded for the purpose of correcting the pleading so that not a legal or equitable cause of action might be presented. This would have necessitated a new trial. The remanding for that purpose, however, became unnecessary by the ruling in said case of *Hornbuckle v. Toombs*, by the highest appellate court known to our laws. The order remanding the cause for that purpose being inoperative, there was no reason for

a new trial of the cause. All the facts that were necessary to warrant the court below in entering judgment had been found by a jury and approved by the court. There was no necessity for the court to go back further in the case than where the error occurred in the proceedings, as the error occurred subsequent to the trial before the jury. There are no facts presented in the cases of *Stearns v. Aguirre*, 7 Cal. 443, and *Phelan v. San Francisco*, 9 id. 16, that show that they are in point. We do not controvert the proposition that where a judgment is reversed for an error occurring before or in the trial of a cause the cause should be tried *de novo*. But we hold that where the error complained of occurs subsequent to the trial, and where a general verdict or a special verdict shows the facts found by a court or jury, and these are not controverted, and they are sufficient to warrant what we deem a correct judgment, and the opinion of the court clearly indicates what it would consider a correct judgment, then judgment of this court to the effect that the judgment of the court below is reversed and cause remanded, should not be construed as granting a new trial, but as putting the parties back to the stage of the case where the error occurred for which the judgment was reversed. We consider this ruling more in accordance with reason and justice than to say that such a judgment should have the effect of granting a new trial. With these views it is not necessary to consider the proposition that the plaintiffs do not raise the issue of title, which the defendants set forth in their answer, to the water in dispute by a replication as required by our rules of practice. It may be that under the practice at the time the pleadings were framed such pleading was not necessary. The judgment of the court below is affirmed, with costs.

Judgment affirmed.

HAASE, appellant, v. CORBIN, respondent.

JURISDICTION OF NON-RESIDENTS — *publication of summons — proof of service.*

H. commenced this action in Meagher county against C., a resident of the State of New York. On the application of H. the court made an order requiring the publication of the summons, and that copies of the complaint and summons be deposited in the post-office and directed to C. at his place of residence. The summons was published, but no affidavit was filed showing that said copies had been deposited in the post-office. *Held*, that the order of the court was legal under the forty-first section of the Civil Practice Act, and must be complied with before C. can be compelled to answer the complaint. *Held*, also, that affidavits showing that the order has been followed strictly, are necessary to prove the service of the summons. *Held*, also, that the court did not acquire jurisdiction of C.

SAME — *attachment — answer and discharge of garnishees.* In this action a writ of attachment was served on certain persons, who answered that they had no goods or credits belonging to C. The answers were not contradicted and no property of C. was found in the Territory. The action was dismissed on the ground that the court did not have jurisdiction of C., or the garnishees, and the garnishees were discharged. *Held*, that the answers of the garnishees must be considered true and that the ruling of the court was correct.

Appeal from Third District, Meagher County.

THE orders in this action were made by WADE, J.

CHUMASERO & CHADWICK, for appellant.

The appellant complied with the statutes of the Territory in publishing the summons and procuring the writ of attachment. The jurisdiction of the court over the parties or subject-matter in no manner depends upon the issuing of the attachment writ. The return of the sheriff upon the writ does not affect the jurisdiction. Judgment can be obtained if defendant has no property. When plaintiff files his complaint and publishes the summons according to the statute, he is entitled to a judgment which can be enforced in the Territory. *Cumberland C. Co. v. Hoffman C. Co.*, 30 Barb. 164; *Bates v. N. O. J. & G. N. R. Co.*, 13 How. Pr. 519.

It was not shown in this case that respondent did not have any property in the Territory. It was error for the court to dismiss the cause without proof of this kind, if it is necessary to the jurisdiction that respondent should have property in Montana.

The answers of the garnishees are not conclusive. The appellant might procure judgment, and then cite the garnishees to appear upon proceedings supplementary to execution, and call witnesses to prove their indebtedness to the respondent. Civ. Pr. Act, §§ 144, 145, 146, 287, 288, 289, 290, 291, 292; Drake on Attachm., § 453.

The process of garnishment holds whatever may be in the hands of the garnishees during the pendency of the action. The effects may be reached by final process.

JOHNSTON & TOOLE, for respondent.

The answer of the garnishees entitled them to a discharge. No judgment would be rendered if there was nothing on which it could be enforced. Drake on Attachm. 5. The court inquired into this jurisdictional fact and properly discharged the garnishees.

It must be evident that no judgment could be entered which would be enforced in the Territory, or elsewhere. Story's Confl. of Laws, § 592 *et seq.*; Drake on Attachm. 448-51; 1 Kent's Com. 280.

The process of the court must be executed upon the person or thing about which the court is to pronounce judgment, before jurisdiction is acquired. Some property of defendant must be subjected to the jurisdiction of the court by service of its process, before a publication of notice to defendant to appear. *Galpin v. Page*, 3 Sawyer, 94.

Our statute has no provision for original proceeding by attachment, whereby the court can acquire jurisdiction over the property of a non-resident defendant, upon which to base a publication of notice against him. No right to require defendant to appear exists until his property is subjected to the jurisdiction of the court. Attachment is only security for a judgment which may be recovered. The attachment relates to residents. Publication of summons does not authorize the rendition of a personal judgment.

BLAKE, J. The appellant filed his complaint May 15, 1874, in the district court in Meagher county, to recover \$6,000 on an implied contract. The record shows that the respondent was a banker and broker in the city and State of New York, and purchased there, at the request of the appellant, and for a valuable

consideration, certain United States bonds of the value of \$6,000, and converted them to his use. A summons was issued and placed in the hands of the sheriff, who made his return stating that he could not find the respondent and that the respondent did not reside in Meagher county. The appellant made subsequently an affidavit showing, among other facts, that the residence of the respondent was in the city of New York, and an order was made by the court requiring the publication of the summons, and that copies of the complaint and summons be deposited in the post-office and directed to the respondent at New York. The summons was published in July and August, 1874, in the *Herald*, at Helena, in this Territory, the newspaper which had been designated for this purpose. At the time of the filing of the complaint the appellant filed the affidavit and undertaking for an attachment, and the writ was issued to the sheriff of Lewis and Clarke county. The persons upon whom this writ had been served made written answers to the effect that they had no goods, effects or credits in their possession or under their control belonging to the respondent. The counsel for the respondent appeared specially for the sole purpose of objecting to the jurisdiction of the court, and moved to quash the summons and dismiss the cause. The motion was sustained and the garnishees were discharged.

It is admitted that the appellant complied with the provisions of the Civil Practice Act in the proceedings which have been described. It does not appear that the respondent had any property within the Territory. The persons upon whom the attachment writ was served were not examined respecting any property of the respondent, possessed or controlled by them, and no affidavits were filed by the appellant showing that their answers were insufficient or untrue. Section 153 of the Civil Practice Act provides that "if the defendant recover judgment, * * * the order of attachment shall be dissolved and the property released therefrom." When the court sustained the motion to quash the summons and dismiss the cause, judgment was thereby rendered for the respondent and against the appellant, and the discharge of the garnishees followed as a legal consequence. If the appellant wished to impeach the answers of the garnishees, or prove that the respondent had any property within the Territory, not exempt

from execution, he should have acted before the motion was determined. The appellant did not furnish the court with information upon the subject, and we must accept the statements of the garnishees as true. *Richards v. Stephenson*, 99 Mass. 312; *Tryon v. Merrill*, 116 id. 299.

The court below did not acquire jurisdiction of this action by means of the attachment proceedings. No property was affected by the service of the writ upon the garnishees, and there is only one question for our consideration: Did the court obtain jurisdiction of the respondent by the publication of the summons? It does not appear that copies of the complaint and summons were deposited in any post-office and directed to the respondent at his place of residence. Section 41 of the Civil Practice Act provides that when the residence of a non-resident defendant is known and the summons is published, the court "shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office directed to the person to be served at his place of residence." The appellant did not comply with this statute and did not obey the order of the court made in accordance with its provisions. It is held in New York under the same law that its terms must be pursued strictly and complied with fully in order to confer jurisdiction. *Voorhies' Code*, § 135, n. *b*, and cases there cited. An order which does not direct copies of the complaint and summons to be mailed, when the residence of the non-resident defendant is known, is void. *Voorhies' Code*, § 138, n. *d*. Mr. Justice FIELD, in *Galpin v. Page*, 3 Sawyer, 94, says: "When constructive service by publication in a personal action is authorized by statute in place of personal citation, the rule prevailing in all courts is, that the statute must be strictly pursued. We are not aware that this doctrine has been denied in any State court." The proof of the service of the summons shall be "in case of publication, the affidavit of the editor, publisher, or his foreman, or his principal clerk, showing the same, and an affidavit of a deposit of a copy of the summons in the post-office, if the same shall have been deposited." Civ. Pr. Act, § 43.

The principles of strict construction which have been referred to must be applied to the statute under consideration. It is evident that a court cannot acquire jurisdiction of an action of this

nature if a copy of the summons has not been mailed properly. This proceeding is as essential to the rights of the parties as that which requires the publication of the summons in a newspaper. Distinct affidavits of the proof of these jurisdictional facts are necessary before the service of the summons can be deemed complete. The transcript contains the proper affidavit, showing the publication of the summons in a newspaper according to law and the order of the court, but there is no proof that a copy of the summons or complaint has been deposited in the post-office as prescribed by the statute. "These affidavits constitute the proof of service." *Sharp v. Daugney*, 33 Cal. 512. The ruling of the court below dismissing the cause for want of jurisdiction is affirmed.

Judgment affirmed.

VANTILBURGH, respondent, v. HAMILTON, appellant.

PRACTICE — *source of title — defects cured — judgment supported by evidence.*

The source of title need not be set forth in a complaint. Defective description of property is cured by answer. Where there is evidence to support the findings of a court, or the verdict of a jury, the appellate court will not reverse a judgment based thereon. *Ming v. Truett*, 1 Mon. 322, and *Griswold v. Boley*, id. 545, affirmed.

MARRIED WOMAN'S SEPARATE PROPERTY. Where a married woman has filed a list of her separate property, as required by law, it is not liable to seizure on execution against her husband.

Appeal from First District, Jefferson County.

JOHNSTON & TOOLE, for appellant.

SHOBER & LOWRY, for respondent.

KNOWLES, J. The plaintiff brought this action to recover the possession of a horse taken by the above-named defendant on a writ of execution, commanding the appellant, Proffitt, as sheriff, to levy upon the property of William Vantilburgh, the husband of respondent. The appellant had filed a list of her separate

property in the county recorder's office of Jefferson county before this, and in due time to save it from being subject to this execution. The appellants demurred to the complaint on two grounds: First. That the complaint did not state a sufficient cause of action, as it did not show that plaintiff had filed this list of her separate property. Second. That the complaint was too uncertain, as it did not particularly describe the property claimed. The description therein is: "One large horse, about six years old." The court overruled this demurrer. This was correct, as to the first ground of demurrer. It was unnecessary that the plaintiff should set forth the source of her title to the property in dispute. Moak's Van Santvoord's Pl. 216; Chitty's Pl. 413.

As to the second ground, I think it should have been sustained. But it is not necessary to determine this. Whatever defect there may have been upon this point, was waived by the defendant's answering to the merits of the complaint and going to trial. *De Boom v. Priestly*, 1 Cal. 206; *Pierce v. Minturn et al.*, id. 470; *Brooks v. Minturn*, id. 481; *Williams v. Soutter et al.*, 7 Iowa, 435; *Abbott v. Striblen*, 6 id. 191.

The only other question presented in this case is as to whether the horse in dispute in this action, and the one specified in the list of property filed in the recorder's office of Jefferson county, is the same. The evidence was, that the plaintiff purchased the horse with her own money; that she mentioned it in her list and described it as a brown horse. She testified that she called the horse a brown horse, although some might call him a sorrel. Pennington, witness for plaintiff, testified that he called the horse a light sorrel, although some might call him *brown*. Hamilton and Boley, the defendants, both testified that the horse was a light sorrel. There may be considerable difficulty in determining the exact color of an animal. The coloring that nature provides for their hair is so various, that even experts may dispute as to the shade of color that should be applied to some animals. According to Webster's Dictionary, the French word, corresponding with our word *sorrel*, means yellowish brown. The judge who tried the case in the court below, upon the issue of facts as well as law, found the description sufficient. Such must be our presumption from his findings. We do not feel competent, from the

evidence before us, to determine whether that horse was a light sorrel or a brown. That necessity was forced upon the judge in the court below, and there was evidence to support his findings upon this point, and hence it should not be disturbed.

Where there is any evidence to support a verdict, or the finding of a court sitting to try issues of fact, the general rule is that neither will be set aside in an appellate court. *Ming v. Truett*, 1 Mon. 322; *Griswold v. Boley*, id. 545.

Our statute provides that the property which a married woman may acquire after her marriage shall be exempt from her husband's debts and liabilities, *provided* that she shall mention such property in a list, and record the same in the office of the register of deeds for the county where she resides. Cod. Sts. of Mon. 521.

According to the presumptions from the findings of the court below, the plaintiff embraced the property in dispute in a list filed in the proper office in due time. The property in dispute was not subject, then, to be seized on execution running against her husband's property. For these reasons the judgment of the court below should be affirmed.

Judgment of the court below is hereby affirmed, with costs.

Judgment affirmed.

HARTLEY, appellant, v. PRESTON, respondent.

PRACTICE—*amendment of pleading.* A court, in furtherance of justice, and on proper terms, should allow an amendment of a pleading so as to make it correspond with the evidence introduced on trial, at any stage of the proceedings before final judgment, and may do so even after judgment. A refusal to do so, may be cause of revising the judgment of the court below. Case of *Wormall v. Reins*, 1 Mon. 630, affirmed.

Appeal from Second District, Deer Lodge County.

SHARP & NAPTON, for appellant.

J. C. ROBINSON, for respondent.

WADE, C. J. This was an action to foreclose a mortgage, executed by defendant Preston to plaintiff, to secure the payment of a contract for 61 ounces, 2 pennyweights and 6 grains of gold dust, signed by defendant Thornton as surety, and for a deficiency judgment in case the mortgaged property, upon sale thereof, did not pay the debt.

The defendant Thornton in his answer sets up the defense that he signed the contract with Preston as surety merely, and that plaintiff for a valuable consideration entered into an agreement with Preston to extend the time for the payment of the contract for gold dust for the period of thirty days.

To this answer the plaintiff replied, denying its allegations as to any agreement to extend the time of payment, and asking judgment as in the complaint. The cause was tried to the court without a jury, by agreement of parties. At the conclusion of the testimony, the following extract from the record will show what occurred: "Here the testimony closed, and the case was argued and submitted to the court, who took the same under advisement. Before the case was submitted defendant Thornton moved the court to declare and find that the plaintiff had not denied the contract for extension of time for thirty days, for a valuable consideration. And afterward, to wit: on the 22d day of April, 1875, and before the court had passed upon the sufficiency of the replication, made its findings or rendered its judgment in the cause, plaintiff moved the court, upon affidavit, showing cause therefor, for leave to amend the replication herein." Then follow the motion, affidavit and order of the court overruling the motion. Thereupon, on the 4th day of May, 1875, the court made its findings of fact, and rendered judgment in the case, among which findings are the following:

"1. That under the pleadings it is admitted that the plaintiff, for a valuable consideration, agreed with the defendant Preston to extend the time of payment of said contract for thirty days.

"2. The court finds that the defendant Thornton was not a party to this agreement for extension of time, and that the same was made without his knowledge or consent."

The exact day when the cause was tried does not appear from the record, but it does appear that the question as to the sufficiency

of the replication was presented to the court upon the argument of the case after the conclusion of the testimony, and that afterward, on the 22d day of April, 1875, and before the court had passed upon the sufficiency of the replication, or made any findings in the case, the plaintiff moved the court for leave to amend his replication, which motion was overruled, and subsequently, on the 4th day of May, findings of fact were made and judgment entered. From these findings, it appears that the court held the replication insufficient, and therefore considered the averments of the answer confessed, and judgment was rendered as on motion for judgment upon the pleadings. It further appears from the record that testimony was submitted to the court upon the matters of defense set up in the answer.

We are unable to see, and there is nothing presented in the record to show why the plaintiff was not permitted to amend his replication, as his affidavit showed that he well could, so as to make the issues in the pleadings correspond with the proof. Even after verdict, and after judgment, in furtherance of justice, pleadings may be amended. We think this case comes within the decision of the case of *Wormall v. Reins*, 1 Mon. 630, where it is held: "The court may, in furtherance of justice, and upon such terms as are just, allow the amendment of any pleading at any stage of a proceeding. This power is a discretionary one, and this court cannot review the exercise of the same unless there has been some abuse of that discretion. Courts have frequently permitted pleadings to be amended even after verdict and judgment, to correspond with proofs in the case, and I can see no reason for refusing to allow the amendment of a pleading to make it correspond with the proofs, before the case is submitted to a jury."

The case under consideration was tried to the court by agreement of parties, but the same rules are applicable to it, so far as amendments of pleadings are concerned, as if it had been tried to a jury. If, upon a trial to a jury, at the conclusion of the testimony, upon an issue that both parties had supposed the pleadings presented, the defendant should move the court for judgment upon the pleadings, because the replication failed to deny the defense set up in the answer, the court would necessarily pass

upon such motion before submitting the case to the jury. And if, before passing upon such motion, the plaintiff had asked leave to amend his replication so as to make the issue in the pleadings correspond with the issue tried in the evidence, we can see no objection to granting such motion upon such terms as the court might deem just. If this is the rule applicable to jury trials, we think it conclusive of the case in hand. After the presentation of the question that the replication admitted the defense contained in the answer, which was in effect a motion for judgment on the pleadings, the cause could not have been submitted to the court until the determination of this motion, as it could not have been submitted to a jury under like circumstances, but during the pendency of this motion the plaintiff asks leave to file a reply, raising an issue upon the averments of the answer, and such an issue as had been already tried in the proof. We think such leave ought to have been granted, especially so when the record shows that eleven days elapsed after the first presentation of the question as to the sufficiency of the replication before the court found the facts and rendered judgment in the case.

The respondent, in his brief, contends that the record does not state the facts, and that the appellant, upon the trial, was granted leave by the court to amend his replication, which he declined. If there was any thing in the record upon which we could base a well-grounded suspicion that this was the case, the judgment would be affirmed at once, for parties cannot refuse to amend pleadings when the opportunity is given at the right time, and then, upon an intimation of a decision against them, claim the privilege. But we have given a faithful representation of the facts contained in the record, and there is no intimation contained in it that the plaintiff ever had an opportunity to amend his pleadings. It is needless to say that we must determine the case upon the record presented here, but we must add that, if the facts are as represented, the attorney for the respondent is responsible for their omission from the transcript. The statement, upon motion for a new trial, which purports to contain a complete record of the case, was settled and agreed upon by the attorneys of the parties as correct, and the court was not called upon to settle such

statement, and did not, because the attorneys of the respective parties agreed as to what it should contain.

Judgment reversed and cause remanded.

Judgment reversed.

BLAKE, J., concurred.

KNOWLES, J., dissenting. I feel called upon to dissent in this case from the opinion expressed by a majority of the court. It is agreed that the record does not show the date of the trial of the cause. It does show, however, that on the argument of the cause plaintiff's attention was called to the fact that his replication did not fully traverse the answer of the defendant Thornton. The record then goes on to set forth as follows: "And afterward, to wit, on the 22d day of April, A. D. 1875, and before the court had passed upon the sufficiency of the replication, made its findings or rendered judgment in the cause, plaintiff moved the court upon affidavit showing cause therefor, for leave to amend his replication herein." I submit, that by no fair construction of this language can it be made to show that the application to amend the replication was made before the cause was submitted on its merits. It states what events had not taken place in the case when plaintiff applied to amend his replication. The submission of the cause is not one of them. The events named might all have occurred after the submission of the cause. The record ought to show, affirmatively, error, before a cause should be reversed.

All presumptions in an appellate court should be in favor of the correctness of the ruling in the court below.

As the record does not disclose that this application was made to amend before the cause was submitted on its merits, this court ought to presume that it was made afterward. It certainly ought not to presume that it was made before that event. Taking as a basis that this amendment was applied for after the cause was submitted, was there any abuse of discretion on the part of the court below in refusing to grant the plaintiff permission to amend his pleadings? His attention had been called to the fact that his replication did not fully traverse defendant Thornton's answer. He chose, notwithstanding this, to submit the case as the plead-

ings then stood. Afterward he changed his mind, and asked permission to amend his replication. If a party has elected to submit a cause to a jury, on defective pleadings, of which he had knowledge, would any rightly informed person hold that while the jury were out considering their verdict he ought to have the privilege to come into court and say he had changed his mind and concluded to amend his pleadings, and had really the ability under oath to make a complete traverse of defendant's answer, the court ought to recall the jury and permit him to amend?

In my judgment to allow an amendment at such a stage, under such circumstances, would be a gross abuse of the legal discretion conferred upon a court in relation to that subject. Certainly, it ought not to be considered an abuse of discretion to refuse to allow said amendment at that time. There is no difference in principle between a case submitted to a jury and one submitted on its merits to the court.

As I view this case the majority of the court have held in fact, whether or not they so intended to hold, that whenever, at any stage of the proceedings, a party comes into court and shows that he has a good defense, which his attorneys have failed to set up, even though the stage should be after the cause was submitted to a jury or court, on its merits, the party should be allowed to amend and set up this defense. And if the court should refuse to allow this it would be guilty of a gross abuse of its legal discretion.

Such a rule I cannot acquiesce in. The case of *Wormall v. Reins*, 1 Mon. 630, is not in point. That was a case where the cause was tried as though a certain issue was made in the pleadings, which was not. When it was discovered that it was not the plaintiff applied for leave to amend the pleadings so as to make this issue. This amendment was applied for and made before the cause was submitted to the jury. The granting permission to make this amendment was assigned as error by the defendant. This court held in that case that there was no abuse of discretion in allowing this amendment. But it did not hold that if the court had refused to allow this amendment it would have been guilty of a gross abuse of judicial discretion. Nor is this the case where a cause was tried and evidence introduced on both sides, as

though an issue was in the pleadings, which was not. Before the trial was in fact finished the record shows that this point was raised, and it does not show that the plaintiff at that time offered to amend and make the issue in the case which was not there and which he was informed was not. And as I have said, as this fact does not appear, it should be presumed in this court that he did not then apply to amend his pleadings, but at some subsequent period. No authorities were cited by the majority of the court to show that at any stage of a judicial proceeding a party has the absolute right to amend his pleadings and make a new issue, upon a showing that his attorneys have neglected to do so, and that he has the ability to make it, and I think none can be cited. Yet, if a party has the absolute right, under the facts and necessary presumptions in this case, to amend, I can hardly conceive of any case in which he should not have this right. This does away with the rule that the allowing of amendments in such cases rests in the legal discretionary power of the court. Or it establishes a still more harsh rule, namely, that in all cases similar to this, and resting upon analogous facts, it would be a gross abuse of the legal discretion vested in a court, not to allow the amendment.

Believing that either of these rules would be wrong, and contrary to the whole current of legal authorities upon the subject, authorities upon these points that are so well known to the profession that I need not quote them, I hold that the judgment of the court below ought to have been confirmed.

MOXON, appellant, v. WILKINSON, respondent.

STATUTORY CONSTRUCTION — *act relating to mining claims—record of discovery.* At the trial of this action to determine the right to the possession of certain placer mining ground, M. offered evidence to prove that he made and filed, in the office of the county recorder, a statement of his discovery of the ground. The statute, approved May 8, 1873, provides that this statement shall be made and filed when "any mining claim upon any vein or lode bearing * * * valuable deposits" is discovered. *Held*, that a vein or lode bearing valuable deposits does not include a placer

mining claim, and that the discoverer of placer mining ground is not required, by the laws of the Territory, to make or file for record a statement of its discovery. *Held*, also, that the evidence is inadmissible.

EVIDENCE OF POSSESSION OF MINERAL LAND. To prove a right to the possession of said ground, M. offered evidence to prove that he dug a ditch after the filing of his adverse claim in the land office, to mine the ground, and that he occupied a dwelling-house and blacksmith shop upon the ground. *Held*, that the evidence is not admissible, and does not tend to prove that M. possessed the ground as a miner or that it is mineral land.

Appeal from Third District, Jefferson County.

THE judgment of nonsuit was entered by WADE, J.

JOHNSTON & TOOLE, for appellant.

The same rule of action is to be followed in acquiring rights to placer mining ground and lode claims. The court erred in excluding the oral testimony offered by the appellants to show their prior rights to the ground in controversy. The general sections of the laws of the United States, regulating these rights, are as applicable to placer mines as lead claims. The appellants' notice and record, filed with the county recorder of Jefferson county, where the mining ground is situate, should have been admitted, there being no district recorder and no mining district.

The instructions issued by the land office have the effect of law. The applicants for the government title to a placer mining claim must comply with them. Courts will regard these instructions and enforce them. Sts. Ex. Sess. 1873, 83, § 1; act of congress for development of mineral resources of the United States, approved June 10, 1872, and instructions of Land Commissioner Hon. Willis Drummond.

CHUMASERO & CHADWICK, and SHOBER & LOWRY, for respondent.

There was no statute of the Territory or United States providing for the record in the recorder's office of Jefferson county. Such a record was a void act, and could not give constructive notice to any parties. Cod. Sts. 400, §§ 23, 24, 25. Constructive notice, by recording, is wholly a creature of the statute. A record not provided for by statute gives no notice. *Mesick v.*

Sunderland, 6 Cal. 315; *Stansell v. Roberts*, 13 Ohio, 148; *Chamberlain v. Bell*, 7 Cal. 294.

The acts of congress relating to lode claims and the instructions of the land commissioner, relied on by appellants, are inapplicable to placer claims. The legislature has not provided that a record shall be made of the location of placer claims. Appellants could only procure the government title by making the proper filing in the United States land office. 2 Washb. Real Prop. 520.

The house and blacksmith shop were placed upon the premises to carry on a trade, and not mine the same. The ditch was dug after the filing of the adverse claim. The court properly excluded testimony relating to these improvements.

BLAKE, J. This action is brought to determine the right of possession to a tract of placer mining ground in Jefferson county, upon the surveyed subdivisions of the public lands of the United States. It is admitted, by the pleadings, that the respondents made their application to enter the premises in the United States land office at Helena, within the Territory, and that the appellants filed their protest and adverse claim. At the trial, the court excluded certain evidence offered by the appellants, and sustained the motion of the respondents for a nonsuit. We are asked to review this ruling.

The appellants allege, in their amended complaint, that they had and held their title and possession under the "rules, customs and usages of the miners in the district where said land is situated, and of the laws of the United States and of the Territory of Montana applicable thereto." The respondents deny these allegations in their answers. Did the testimony produced by the appellants tend to establish their material averments?

No evidence was offered tending to prove that the appellants had or held the property in controversy by virtue of any rules, customs or usages of any miners. On the contrary, the appellants testify that the ground in dispute is not in any mining district, and that there are no mining laws or customs governing its use or possession.

The appellants offered evidence for the purpose of proving that they made a record of the discovery of the premises in the office of the recorder of Jefferson county. It appears that no other record has been made by the appellants. This evidence was rejected by the court. The appellants maintain that the act of the legislative assembly, "providing for the location and recording of mining claims on veins or lodes," approved May 8, 1873, is applicable to placer mining ground. Sts. Ex. Sess. 1873, 83. If this proposition is correct, the record should have been admitted. This act requires a person to make, and file in the office of the county recorder, a statement of the discovery of "any mining claim, upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." § 1. The technical words contained in this clause must be construed according to their peculiar and appropriate meaning. Cod. Sts. 389. In the language of miners, a lode is a vein containing ore. Veins are narrow plates of rock intersecting other rocks, and are the fillings of cracks or fissures. The placers are superficial deposits, which occupy the beds of ancient rivers or valleys. This name was given by the Spaniards to the auriferous gravels of America. Dana's Geology; Simonin's Underground Life. A vein or lode of "valuable deposits" does not include a placer mining claim. This act was adopted as a substitute for the statute which prescribed the manner of locating and pre-empting quartz lodes or veins. We cannot infer from the language of the amended act that the legislative assembly intended to affect placer mining claims, a subject on which the law-makers appear to be silent. There is no law of the Territory which requires the discoverer of a placer mining claim to make or file for record a statement respecting it. The instrument purporting to be a record of the ground in dispute, by the appellants, was not made and filed under the laws of the Territory, or the United States, and could not be a legal notice of their rights to the respondents. It was not a link in the chain of their title, and the court properly excluded it as incompetent evidence. *Mesick v. Sunderland*, 6 Cal. 315, and cases there cited.

In legislating upon these matters, congress has recognized the distinction between lodes or veins of quartz and placer claims. Th

possessor of the former could procure the title of the United States a number of years before it was legal to grant a patent for the latter. The act was amended by providing that "claims, usually called 'placers,' including all forms of deposit, excepting veins of quartz, or other rock in place," shall be subject to entry. Rev. Sts. U. S., § 2329. A vein or lode may be embraced by a placer claim, and the eleventh section of the act approved May 10, 1872, defines the proceedings which are necessary for the adjustment of the rights of the parties in the possession of the same. *Id.*, § 2333. The appellants did not offer any evidence that they had complied with the statutes of the United States relating to placer claims.

There is no testimony showing that any "valuable deposits" have been discovered upon the ground in controversy, or that any persons worked, improved or possessed the premises as a mining claim before this action was commenced. It does not appear that this tract is not agricultural land. The appellants offered to prove that they dug a ditch and made improvements, for the purpose of mining the ground, after the bringing of the suit. The rights of the parties to the possession of the property at or prior to the time that the appellants filed their adverse claim in the land office, cannot be determined by the subsequent acts of the appellants. The court did not err in refusing to allow testimony concerning these facts to be introduced.

It is claimed that the court erred in excluding the evidence of one of the appellants, showing that he had upon the premises a house, in which he lived, and a blacksmith shop. These improvements appear to have been made for the purpose of carrying on a trade. The character of the possession, which the appellants seek to prove by this testimony, is not consistent with the title which they are trying to maintain in this proceeding. The construction of the house and shop does not tend to show that this appellant possessed the land as a miner, or that it is mineral ground. Conceding the facts to be stated correctly by the appellants, we do not think that they impair the rights of the respondents, or any persons claiming the property for mining purposes.

The appellants failed to prove the material allegations of their complaint, that their possession is under the rules and customs of

the miners in the district containing the placer claim and the laws of the Territory and the United States, and it was the duty of the court to grant the motion for a nonsuit.

Judgment affirmed.

TERRITORY OF MONTANA, appellant, v. HILDEBRAND, respondent.

APPEAL — *right of* — *in Territory*. The Territory of Montana is a corporation, entitled to maintain civil suits in its own name, with same right of appeal when aggrieved as any other party.

RECOGNIZANCE — *suit on* — *in what name brought*. Suits on forfeited recognizances should be brought in the name of the Territory. The provision of statute, that all actions should be in the name of real parties in interest, does not apply. The Territory becomes trustee of money so recovered and the law declares to whom it shall go.

MISJOINDER. Only a party improperly joined can take advantage of it.

RECOGNIZANCE — *jurisdiction* — *cause*. Under the statutes of Montana it is not necessary that a recognizance should show either the jurisdiction of magistrate or cause for its execution.

PROBATE SEAL. The probate judge, acting as a committing magistrate, is not performing the functions of a probate court, and need not use the court seal.

CONSTRUCTION — *ambiguity*. The recital in the recognizance was that the defendant should appear to answer on the first day of the next October term, but added erroneously, "it being the second Monday in October, 1874," whereas the term was fixed by law to open on the first Monday in the month. *Held*, that the recital was sufficient; the erroneous portion should be rejected as surplusage; the law fixes the day of the term.

VARIANCE — *no consideration*. An attempt to commit murder, and an assault with intent to commit murder, are different offenses under our statutes. If the order of the magistrate required defendants to appear and answer a certain crime, a recognizance conditioned to answer any other offense is bad. There is no consideration for such a contract.

Appeal from Third District, Jefferson County.

J. G. SPRATT, District Attorney, First District, for appellant.

SHOBER & LOWRY and JOHNSTON & TOOLE, for respondent.

KNOWLES, J. The respondents ask to have the appeal in this case dismissed for the following reasons :

First. No appeal lies from an order sustaining a demurrer.

The record shows that the appeal in this case was taken from the final judgment entered in the court below. This ground of the motion is not then based upon any fact in the record and cannot be sustained.

Second. The right of appeal in civil cases is not given to the Territory of Montana by any statutory provision.

In the case of *Langford v. King*, 1 Mon. 33, this court held that Montana Territory was a government. Our Organic Act calls it a temporary government. From the nature of this government it must of necessity be a body politic, or artificial person, a corporation. As such, having the right to make contracts, it has the right to sue upon them without any statute empowering it to do so. *Cutton v. United States*, 11 How. (U. S.) 229.

This is an action upon a recognizance to recover the penalty therein specified. Hence it is a civil action and not a criminal proceeding. The Territory having the right to become a party plaintiff to civil proceedings has the same rights that any other party in civil litigation has. The statutes of the Territory provide that any party aggrieved may appeal from the district to the supreme court in certain cases. The appeal in this case is from a final judgment and is proper.

Motion denied.

KNOWLES, J. This is an action on a recognizance executed by the respondents, Hildebrand, Quinn and Smith, to Montana Territory, in the sum of \$1,500, conditioned to secure the appearance of Wm. E. Grinnell at the October term of the district court for Jefferson county, at Radersburg, for the year A. D. 1874. The defendants demurred to the complaint herein, alleging that it was defective in many particulars. Some of the objections will be considered hereafter. The court sustained the demurrer. To this ruling the plaintiff excepted and appeals to this court, assigning this ruling as error. The complaint in substance sets forth that Grinnell, on the 26th day of August, A. D. 1874, was arrested on a complaint filed before James R. Weston, probate judge for the county of Jefferson, Montana Territory, and ar-

raigned for examination upon the charge of an assault with intent to commit murder, and it appearing to the said judge that there was probable cause for believing that said Grinnell was guilty of said offense, and said Grinnell having waived a preliminary examination, it was thereupon ordered by said court that said Grinnell be held to answer the said charge at the next term of the district court to be held in said county, and that the said Grinnell be admitted to bail in the sum of \$1,500. Whereupon the defendants, Hildebrand, Quinn and Smith, entered into said recognizance, the condition of which is in these words: "If the said William E. Grinnell shall personally appear at the next term of the district court, in and for said Jefferson county, Montana Territory, being the second Monday in October, 1874, and on the first day thereof, to answer to any indictment that may be brought or made against him for the offense of an attempt to commit murder, as alleged in a complaint now on file in the probate court of said county and Territory, and to do and receive what shall be by said court then and there enjoined upon him, the said Wm. E. Grinnell, and shall not depart from said court without leave."

The complaint further sets forth that Grinnell was indicted for the crime of an assault with intent to commit murder, and that the recognizance was forfeited.

It is claimed by the respondents that the Territory of Montana is not the proper party plaintiff in this action; that the action should be prosecuted in the name of the county commissioners of Jefferson county and the district attorney, they being, it is alleged, the real parties in interest.

It is true that the penalties recovered on any forfeited recognizance go to the county. The county may receive a benefit from the action, but it does not follow that the action should be prosecuted in the name of the county commissioners. All criminal prosecutions are prosecuted in the name of the Territory as plaintiff. This recognizance follows the forms prescribed in the statutes of the first legislative assembly of this Territory, and it is doubtful if the act of that assembly on this subject has ever been repealed. But whether it has been repealed or not, it is proper that all recognizances should be executed to the Territory

of Montana. There are no provisions of the statute that authorize the execution of a recognizance to a county. But, if it were proper to execute a recognizance to a county, this recognizance would be good. The Territory may be the trustee of an express trust. Many of the county officers of this Territory execute bonds to the Territory, and it takes these bonds as a trustee of an express trust for the benefit of any citizen of the Territory who may be damaged by the failure of such officer to perform his duties as required by law. In *Taaffe v. Rosenthal*, 7 Cal. 514, the court held that a bond executed to the State of California in an attachment proceeding, in accordance with the provisions of the statutes of that State, was good, and the sureties held thereon. That is a stronger case than this, even if the county was the proper party to a recognizance. In *Hawkins v. State*, 24 Ind. 288, the court held that the State was a proper party to a recognizance, although the money went to the school fund of the county. The proposition that the district attorney, because he receives a compensation of ten per cent on all moneys collected by him, should be a party to all actions on a recognizance, is not worthy of any consideration. The trustee of an express trust can maintain a suit in his own name, and if the law points out who is the beneficiary in the action, there need be no allegations showing for whose benefit the action is prosecuted. No party is required to allege the law or prove it.

The respondent alleges that there is a misjoinder of parties defendant; that Grinnell is not a proper party in an action on this recognizance. This is true, but Hildebrand, Quinn and Smith cannot object to this error. The party improperly joined is the only one who can take advantage of the same.

It is claimed that neither the recognizance or complaint shows any jurisdiction in the officer taking it, and that the recognizance shows no cause for its execution. It is not necessary that the recognizance should show the jurisdiction of the officer taking it, or any cause for its execution. That was the rule under the common-law practice, but has been abolished by section 257 of our Criminal Practice Act. It is as follows:

“No action upon a recognizance may be defeated for any defect of form or any omission of recital, condition, or undertaking

therein, or neglect of the clerk to indorse or record it; but the sureties shall be bound thereby to the amount specified therein. A recognizance may be recorded after execution is awarded." This statute was enacted for the purpose of abolishing those formal and technical recitals in a recognizance showing the jurisdiction of the officer awarding bail, and that proper proceedings had been had to make it necessary for a party to give a recognizance.

It was not necessary that the seal of the probate court should have been affixed to this recognizance, the justification of the sureties or the approval. The probate judge, in acting as a committing magistrate, does not act as the probate court. The seal of the probate court is required to be affixed to certain writs and proceedings in that court and to none other in the nature of judicial proceedings.

It is urged that the probate judge should have made an order admitting Grinnell to bail. The complaint shows that such an order was made. It was not necessary that it should have been recited in the recognizance.

The respondents maintain, and the question is not free from difficulty, that the recognizance was forfeited before the time fixed therein for the appearance of Grinnell. The proper construction of the recognizance upon the time fixed for the appearance of Grinnell is, that they undertook that he should appear on the first day of the October term of the district court for Jefferson county, A. D. 1874. It was thought that this term of court commenced on the second Monday in said October instead of the first Monday, and the parties so recited in the recognizance. It will be observed, upon an inspection of the recognizance, that the defendants did not undertake that Grinnell should appear on the second Monday in October, 1874, but on the first day of the term of the above district court for October of that year. The law was that the district court should open on the first instead of the second Monday. When the defendants undertook that the accused should appear on the first day of that term, the law came in and said "this is the first Monday in October." The defendants undertook to say, contrary to the provisions of law, of which they were bound to take notice, that this was the second Monday in October. Here is an ambiguity which is the subject of judicial construction. I

think the material part of this undertaking was that the defendant Grinnell should appear on the first day of the term of that court, and the time fixed in that recognizance, for the time of holding that court, being mere description, and contrary to the provisions of law, should be disregarded, or should not make void the recognizance. If the defendants were damaged by this recital it might be a matter of defense under proper averments. If the undertaking had been that the defendant Grinnell should appear on the second Monday in said October, a different question would be presented. The order of forfeiture in regard to this recognizance having been made during the October term of said court, after the first day and after the indictment had been found against Grinnell, was not void.

The crime set forth in the recognizance is an attempt to commit murder. This is an offense under our statutes. Section 191 of our Criminal Laws provides, that "Every person who shall attempt to commit a public offense, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof," etc. The punishment of this offense is provided for in this section. Murder is a public offense. The attempt to commit murder is an offense under this section.

While under our statute the jurisdiction of the court taking the recognizance need not be recited therein, nor the proceedings and orders requiring a party to enter into a recognizance for his appearance at court, these facts should appear in a complaint which seeks to recover judgment on such a recognizance.

In *Hawkins v. State*, 24 Ind. 288, the court says: "Without proof showing the facts which authorized the justice to take the recognizance, the finding should have been for the appellant." If it is necessary to prove such facts it is necessary to allege them. The same reasons that required, under the practice before the adoption of our statutes upon criminal procedure, that the recognizance should show the jurisdiction of the court and the proceedings that warranted the giving of the same, apply to a complaint under our practice to recover judgment on a recognizance. These facts should appear in such a complaint as much as the consideration for a promise to pay a certain sum of money should be set forth in a complaint asking judgment for that sum. In

this complaint the allegations show that the defendant Grinnell was arrested upon a complaint and arraigned for examination upon the charge of an assault with the intent to commit murder. It appearing that the said defendant waived examination, and the judge, having reasonable cause for believing him guilty of said charge, ordered him held to bail to answer said charge at the next term of the district court. In these allegations there is sufficient to show that Grinnell was required to enter into a recognizance for an assault with the intent to commit murder. The recognizance recites that the crime which the defendant Grinnell was required to appear and answer for, was an attempt to commit murder. This is a different offense from an assault with the intent to commit murder. There may be an attempt to commit an assault. 2 Bishop on Crim. Law, §§ 62, 739, *et seq.*, treats of the attempt to commit murder. An assault is not a necessary ingredient of every murder. 2 *id.*, § 56. I can conceive of attempts to commit murder, and of acts done toward its commission, and no assault having been committed upon such person. If an assault with intent to commit murder is a different offense from an attempt to commit murder, we are presented with the question: Would a recognizance given for the appearance of a person to answer an indictment for an attempt to commit murder be good, when it appears that he was ordered to give a recognizance to answer for an assault with the intent to commit murder? I think it would not. Suppose a party is held by a magistrate to answer for the crime of murder, would any one think a recognizance would be good which in pursuance of such order undertook that the defendant was to appear and answer for the crime of larceny? Suppose a party charged with murder should be held to answer that crime, could he present to the officer having him in charge a recognizance which undertook that he should appear to answer the charge of larceny, and ask that he should be released, although the amount might be sufficient and the sureties responsible? The statement of such a proposition is a sufficient answer. Such a recognizance would not prevent a party's re-arrest. There would really be no consideration for such a recognizance. The real consideration for a recognizance is that a party under arrest shall be released therefrom under certain conditions. If a recognizance

will not have that force it is void. It is not what the parties intended when they entered into it. Although there is not the same difference between the crime "of an attempt to commit murder," and "an assault with the intent to commit murder," as between murder and larceny the principle is the same. If there is no such crime as "an attempt to commit murder," then the recognizance is bad. When an attempt to describe a crime is made in a recognizance, and the defendant is required to appear and answer an indictment, the offense should be an indictable one. *Baily v. The State*, 4 Tex. 417; *Cotton v. The State*, 7 id. 547. This is not an omission in the undertaking of the defendants. It is an undertaking which they were not required to enter into under the order of any court, so far as the complaint shows. On this last ground the judgment of the court below is affirmed.

Judgment affirmed.

BARKLEY, respondent, v. TIELEKE, appellant.

PRACTICE — *remedy for errors in appellate court — immaterial variations disregarded.* Errors in a former decision of the appellate court cannot be reviewed on an appeal from the judgment entered in the court below in pursuance of such decision, but only on motion for a rehearing or appeal to a higher court. The judgment of the court below in decreeing absolute title in the party in whose favor the appellate court directed that a perpetual injunction should issue, is not such error that this court will set aside such judgment. The finding in favor of the perpetual injunction presumes such title.

Appeal from First District, Jefferson County.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for appellants.

G. G. SYMES, for respondents.

KNOWLES, J. The appellants claim in this case that the court committed an error when it was formerly before it, in ordering that the court below should enter a judgment granting a perpetual

injunction against the appellants herein, besides reversing the judgment that had been entered therein by the court below ; that on that appeal this court should have granted only a new trial.

If this court committed an error in this case on a former appeal, it cannot review it in this proceeding. Any error then committed can be reviewed by this court only on a rehearing, or on an appeal to a higher court. The *respondents* in this appeal were the *appellants* in the former one, but so far as the record of this case discloses the action of this court on the former appeal, I still fail to see any error that it then committed. The appellants claim that they did not have their day in court with their witnesses. There is nothing in the record that discloses this. The inference to be drawn from the record is the reverse. This is part of the judgment that was reversed on the former appeal :

“ This cause coming on to be heard before Hon. F. G. SERVIS, judge of said court, in chancery sitting, at the March term of said court, A. D. 1873, upon the bill, answer and replication filed in said cause, and the proofs and allegations of the respective parties, and the court being fully advised,” etc.

It is evident that there was a trial of the cause, and unless this is a formal record, both parties introduced proofs. If the appellants did not there is nothing to show that they could not have done so.

The second error assigned by the appellants is, that the district court exceeded its authority as instructed by the supreme court. The supreme court directed only that a perpetual injunction issue against appellants. The district court went further, and decreed an absolute title to certain property in respondents. The pleadings in this case are not a part of the record, but from what appeared in the opinion of this court on the former appeal, and which is a part thereof, it is evident that the object of this action was to procure a perpetual injunction restraining the appellants herein from diverting the waters of Indian creek. Before such a writ could issue, it was necessary to find that as against these appellants the respondent was the owner thereof. This court, when the case was before it on the former appeal, undoubtedly held, basing its ruling upon the evidences presented in the record and the findings of the court below, that the respondent was the owner

of this water, as against appellants. The opinion in that case, which, as I have said, is a part of this record, clearly shows this. Hence it ordered the court below to issue the injunction prayed for. The mere fact that it ordered a perpetual injunction raises the presumption that it found that the respondent, as against the appellants, was entitled to this water. Although it was not necessary for the purposes of the case for the court to make this conclusion of law a matter of record, yet I am unable to see how the appellants could be damaged by this finding. It was only making a record of what would be the legal presumptions from the awarding of the perpetual injunction.

For these reasons I find no error in the judgment of the court below that should reverse it. The judgment of the court below is affirmed, with costs.

Judgment affirmed.

BARKLEY, appellant, v. TIELEKE, respondent.

PRACTICE—*findings by supreme court.* This court cannot find the facts from the evidence produced at the trial in the court below, and order that the judgment be entered thereon.

SAME—*judgment upon the findings—new trial.* When the facts have been found by the court below and are not disturbed, and the conclusions of law are erroneous, this court will not order a new trial, but direct that the proper judgment be entered according to the facts.

THE original appeal is reported *ante*, 59.

CHUMASERO & CHADWICK and SHOBER & LOWRY, for the motion to set aside the judgment.

This court had no jurisdiction to render the judgment. Its powers are limited in section 378 of the Civil Practice Act. *Barkley v. Logan*, *ante*, 296. This court has no right to render an original decree after a decision has been reversed. The party against whom the reversal is ordered should have an opportunity to present his case. *Cuff v. Dorland*, 57 N. Y. 560; *Meyer v. Louisville*, 26 Barb. 609; *Griffin v. Marquardt*, 17 N. Y. 28; 3 Estee's Pl. 751-5, and cases cited.

The supreme court in New York and California has directed what judgment shall be entered when there were special findings, and it was apparent that in no state of proof, applicable to the issues, could the respondent be entitled to a judgment. *Bell's Adm'x. v. Golding*, 27 Ind. 173.

TOOLE & TOOLE, contra.

Only one question was tried by the court below—Who should have judgment upon the findings? This court has determined the character of the judgment to be entered in accordance with the constant practice of all courts of appeal under similar statutes.

BLAKE, J. At the August term, 1874, this court reversed the judgment of the court below in favor of the respondents, and ordered that a final decree be entered for the appellant. The respondents then filed a motion to set aside this order and ask that the cause be remanded for a new trial. It is claimed by the respondents that this court had no authority to make the order, and we are called upon to consider this question.

The jurisdiction of this court over the subject is defined in section 378 of the Civil Practice Act, which provides that the supreme court may reverse, affirm or modify the judgment or order appealed from, and set aside, confirm or modify any of the proceedings subsequent to, or depending upon, such judgment or order, and, if necessary or proper, order a new trial.

The appellant and respondents claimed certain ditches, dump ground and water privileges, and the complaint and answer contain general and special prayers for an adjudication of their rights and equitable relief. The action was tried by the court without a jury, and the facts found, and conclusions of law thereon, were stated separately in the finding which was filed. No exceptions to the findings of the facts were taken by the parties. Upon the trial of an issue of fact by the court, judgment must be entered in accordance with the findings. Civ. Pr. Act, § 220. At the hearing of the appeal, this court did not disturb the findings of the facts, but held that the legal conclusions of the court below were erroneous. *Ante*, 59. Under these circumstances it was not deemed "necessary or proper" to remand the cause for a new

trial, and the order complained of directed that the judgment be rendered according to the facts.

This court followed the decisions of California and New York, under the same statute. In *Love v. Shartzer*, 31 Cal. 488, it is held, that if the judgment is erroneous and the findings of the facts are such as to enable the supreme court to determine what kind of a judgment should have been rendered, the court below will be directed to enter the proper judgment. The courts of New York decide that the appellate courts have the power to order a final judgment when the facts have been found by the court below. *Edmonston v. McLoud*, 16 N. Y. 543; *Cuff v. Dorland*, 57 id. 560. The cases cited by the respondents establish the principle that this court cannot find the facts from the evidence and enter judgment thereon. We admit that this rule is correct, but it is not applicable to this case.

The statutes regulating the jurisdiction of this court have been complied with. It was not necessary or proper to order a new trial of this action. The facts had been found and were before this court, and the order commanding that the final judgment should be rendered thereon was a legal result.

The motion is overruled.

KENNON, respondent, v. KING, appellant.

POKER—*a game of chance — within the statute — for the court and not for the jury to decide.* It is a question for the court and not for the jury to decide whether the game of cards, usually denominated "poker," is a game of chance and within the statute, requiring the keepers of houses, where games of chance are played for money, to pay license therefor. The meaning of words and the grammatical construction of the English language, so far as established by rules and usages of language, are matters of law to be construed by the court. Only when words are used in a peculiar and unusual signification is testimony admissible for explanation.

Appeal from Second District, Deer Lodge County.

J. C. ROBINSON, for appellant.

The only question in this case is whether it is the province of the court or the jury to decide whether the game called "poker" is a game of chance. The court erred in deciding that it was the duty of the court to construe the meaning of the word.

A. E. MAYHEW, District Attorney, Second District, for respondent.

It is a question for the court and not for the jury to construe language and declare the legal and proper meaning of words used in their ordinary acceptation. Bishop on Statutory Crimes, §§ 862-871 inclusive.

WADE, C. J. There is but one assignment of error in this case, and it arises upon the following instruction given by the court to the jury :

"The jury are instructed that the game usually denominated 'poker,' as played with cards, is a game of chance. And if the jury find, from the evidence, that the defendant kept a room in which, with his knowledge and consent, this game was played during the months of January, February and March, 1875, you must find for the plaintiff."

The defendant insists that the question, whether the game of cards, usually denominated "poker," is a game of chance, is a question of fact for the jury, and not of law for the court, and, therefore, that the instructions were erroneous.

The action was brought by virtue of the provisions of a statute of the Territory that provides as follows : "Any person * * * who shall keep any house, or saloon, or room, where any banking game, or other game of chance, is dealt or played for money, or any thing representing money is used, * * * shall pay a license," etc.

As a general proposition, we should say that the construction to be put upon a particular statute, and the words therein used, and its force and effect, and to what it applies, is a question of law for the court, and not of fact for the jury. Certainly, unless technical or ambiguous words, or words of a local or provincial meaning are used, no testimony would be admissible as to what was intended, or to apply the statute to its proper subject-matter.

The same rule would apply as to words in common use in a pleading. The definition of words in general use and of a fixed and universal meaning, their interpretation, or whether they come within the scope, or object and purpose of a statute, are matters of law for the court, and such meaning cannot be varied or explained by testimony. It is not the province of juries to supplant the use of dictionaries, and to declare what is meant and intended by the use of ordinary words of a general nature and unambiguous in their character. Otherwise, a common word in general use might mean one thing in one locality and exactly the reverse in another, depending upon the peculiar notions of the jury to whom the question was submitted. Juries cannot be permitted to pervert, vary or change the established meaning or use of the English language. And it is improper to submit to a jury, upon the testimony of witnesses, the meaning of an unambiguous word in common use.

Experts may explain the meaning of "technical, or ambiguous words," but the word "poker," as applied to a game of cards, has, so far as we know, but one meaning, and its definition was correctly given in the instructions of the court. We see no reason for calling proof as to the meaning of this word that would not apply, with equal propriety, to the words deed, lease, contract, river, city, church, or any other word in general use, and whose meaning is universally understood.

In *Brown v. Brown*, 8 Mete. 546-7, SHAW, Ch. J., said: "The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of the language, are *prima facie* matters of law, to be construed and passed upon by the court. But language may be ambiguous and used in different senses, or general words in particular trades and branches of business, as among merchants for instance, may be used in a new, peculiar or technical sense. And, therefore, in a few instances, evidence may be received from those who are conversant with such branches of business, or such technical or peculiar use of language, to explain or illustrate it."

But in the case at bar there is nothing to indicate that the game of cards, commonly called "poker," as used in the pleadings and as explained in the instructions, had any new, peculiar or techni-

cal meaning. On the contrary, the reverse does appear, for the complaint declares that the game played was the game at cards known as the game of "poker." And for a word thus known and denominated, and taking it to be used in its popular and general sense, as we must, the court ruled correctly in declaring its meaning as a matter of law, and in refusing to submit the question on proof to the jury.

The pleadings admit that a game of cards, known as "poker," was played, the answer only denying that such game is a game of chance. The court properly instructed the jury, as a matter of law upon the subject, and the judgment is affirmed, with costs.

Judgment affirmed

FORD, appellant, v. SUTHERLIN, respondent.

MORTGAGE—*"now growing and standing" grain.* K. mortgaged to F. certain oats, etc., "now growing and standing" in a field, August 12, 1871. On the following day S., the sheriff, levied upon the property under a writ of attachment in favor of a creditor of K., and afterward sold it under an execution. On August 12, 1871, the grain had been cut, and one-half of it had been threshed before the officer levied thereon. *Held*, that the mortgage does not include, as against third parties, the grain which had been cut or threshed. *Held*, also, that the expression, "now growing and standing," describes the condition of the cereals when they are nourished and supported by the earth.

Appeal from Third District, Meagher County.

THE action was tried by WADE, J., who entered a judgment of nonsuit against Ford.

JOHNSTON & TOOLE and SHOBER & LOWRY, for appellant.

Appellant relies solely upon the grammatical construction of the description of the mortgaged property. The words "growing" and "standing" are not synonymous terms. They include all the grain at the date of the mortgage which was growing in the ground and not severed, or cut and standing upon the ground. They have the same effect as the expression, "all the wood and timber cut and

uncut," in *Claflin v. Carpenter*, 4 Metc. 580. "Growing" and "standing" are used in the mortgage as adjectives and qualify wheat, oats and barley.

CHUMASERO & CHADWICK, for respondent.

The words "growing" and "standing" should be construed according to their primary acceptance. Growing refers to an object endowed with life, and standing refers to objects which are erect and not cut down. The case of *Claflin v. Carpenter*, cited by appellant, is in opposition to the proposition of appellant. The word "standing" is applied to timber which is growing and uncut. *Douglas v. Shumway*, 13 Gray, 498; *Nettleton v. Sykes*, 8 Metc. 34.

Mortgaged property should be described accurately so that there can be no mistake about its identity. If this property was not growing and standing in the field the mortgage constituted no notice to the creditors of the mortgagor.

BLAKE, J. G. Kronk executed and delivered to the appellant, August 12, 1871, a mortgage on certain chattels in Meagher county, described as follows: "Being one-half undivided interest in and to all the oats, wheat, barley and potatoes now growing and standing in the field or ranch of George Siggs, in the Missouri Valley." The instrument was filed for record in the office of the county recorder on the same day at six o'clock, A. M. On the following day the respondent, as the sheriff of Meagher county, levied upon and took possession of the oats, wheat and barley under a writ of attachment issued in an action commenced against Kronk and another party. Judgment was entered against Kronk and his co-defendant December 1, 1871, and the respondent, as the sheriff, sold the property and applied the proceeds in partial satisfaction of the execution. The appellant brings this action to recover the value of the grain that was attached and sold by the officer.

The transcript appears to show that the oats, wheat and barley had been cut before the 12th day of August, 1871, and piled up on the ranch of said Siggs. Persons were engaged in threshing the grain in the morning of this day. At the time that the

officer levied upon the property, one-half of the grain had been threshed and stored in a granary on the ranch of one Perkins, and was not on the ranch of Siggs. A nonsuit was granted upon the trial on the motion of the respondent.

The appellant relies on one point to procure a reversal of this ruling. He contends that the words "growing and standing," which are used in the mortgage, embrace all the grain which was standing on the ranch, or in the shock, or on the natural stalk, and growing above or in the ground and cut or harvested. The only case that is cited in the brief is that of *Claflin v. Carpenter*, 4 Metc. 580. The appellant submits that the terms "growing and standing" have the same effect as the clause in that decision, "all the wood and timber cut and uncut," relating to the interests of the parties under a mortgage.

We cannot inquire into the intention or understanding of Kronk and the appellant in executing the mortgage and examine the testimony concerning the matter. The rights of persons who are not the parties to the instrument are involved in this case, and the words "now growing and standing" must be understood and construed according to the approved and common usage of the language. Cod. Sts. 389. Vegetable bodies are "growing" while their bulk is being enlarged by the natural addition of matter through ducts. Trees and plants are "standing" when they are erect and supported by their roots. Webster's Dict. We think that these definitions are applicable to the property described in the mortgage, which was sold by the respondent. It is evident that the oats, wheat and barley were not "growing and standing" when the sheriff levied upon them. The parties to the instrument could have protected the mortgaged property by using the comprehensive terms which appear in *Claflin v. Carpenter*, *supra*, and the argument of the appellant in defining the words "now growing and standing," and have been mentioned. But they employed language which has received the interpretation in many cases that we have expressed, and the respondent and innocent persons would act correctly in giving it the same meaning.

The case of *Goodyear v. Williston*, 42 Cal. 11, resembles that at bar, although the decision depends upon the construction of the act relating to mortgages upon growing crops. This view of the

words used by the appellant is supported by the following authorities: *Olap v. Draper*, 4 Mass. 266, "all the trees and timber standing and growing on the close;" *Brown v. Wellington*, 106 id. 318, "standing grass;" *Delaney v. Root*, 99 id. 548, "growing annual crops;" *Hill v. Hill*, 113 id. 105, "all the wood, timber and trees now standing;" *Schulenberg v. Harriman*, 21 Wall. 64; *Davis v. McFarlane*, 37 Cal. 634. The distinction is recognized between trees and cereals, which are "growing and standing," and those which have been cut and severed from the freehold. The change in the condition of wood and grain, caused by these acts, affects materially the rights of the parties to an agreement, mortgage, or bill of sale of the property. We have not found one case which sustains the point on which the appellant relies, and are therefore of the opinion that the mortgage given to the appellant by Kronk cannot be enforced in this action against the respondent.

Judgment affirmed.

SMALLHOUSE, appellant, v. KENTUCKY AND M. G. AND S. M. Co.,
respondent.

MECHANIC'S LIEN—*general agent or superintendent not entitled to.* A claim of a mechanic's lien against the buildings, machinery and mining ground of a corporation by one who alleges himself to have been employed as agent, manager and superintendent of said corporation, at a certain monthly salary, in the erection of buildings and working of mines, does not come within the spirit or letter of the mechanic's lien law of Montana. The superintendent of a corporation stands in the place of the corporation itself toward others intended to be protected by the law. *Quere* as to the validity of a joint lien upon separate and distinct parcels of property.

Appeal from First District, Madison County.

J. E. CALLAWAY and J. G. SPRATT, for appellants.

A corporation can only act through its agent. Appellant stood in the same relation to the corporation, and was entitled to same rights as a stranger or any other contractor doing work and fur-

nishing supplies. *Angell & Ames on Corp.*, § 233; *Worcester Turnpike v. Willard*, 5 Mass. 85; *Gilmore v. Pope*, id. 491; *Phillips on Liens*, § 158.

The language of the statute is very broad, and extends to mechanics, builders, lumbermen, artisan, workman, laborer or "other person." Such liens attach to the building, erection or improvement for which the materials were furnished or the work done. *Cod. Sts.*, § 10, p. 511.

S. WORD, for respondent.

The allegations of the complaint show that plaintiff was superintendent for the corporation at a monthly salary to supervise the work of others. The statute was not intended to give a lien to such persons or for such services. *Cod. Sts.*, § 1, p. 509; *Phillips on Mech. Liens*, §§ 156-7; *Blakey v. Blakey*, 27 Mo. 39.

A superintendent stands on same footing as member of the corporation. *Phillips on Liens*, § 39. He can contract with the corporation, but can have no lien on its property for his services. The case of 27 Mo. 39 is in point, being the construction given by the court to a statute identical with our own.

WADE, C. J. This is an action to foreclose a mechanic's lien. The defendant, "The Kentucky and Montana Gold and Silver Mining Company," is a corporation created under and by virtue of the laws of the State of Kentucky, doing business in the Territory, and having an office and place of business in the county of Madison. This defendant is in default, having made no appearance in the case. The defendant Elling appeared and filed a demurrer to the complaint, which was sustained, and thereupon judgment was rendered in his favor.

The plaintiff claims a lien upon a certain quartz mill, together with the engine, boiler, belting and other machinery belonging to and used in working the mill, also upon four dwelling-houses situate in the immediate vicinity of the mill, together with the land on which the mill and buildings stand, also upon Discovery claim, and claims numbered one, two, three, four and five, north-east from Discovery claim, and claims numbered one, two, three, four and five, south-west from Discovery claim, on the Rising Sun

quartz lode, together with the privileges and appurtenances thereto belonging.

To bring himself within the statute giving a lien to mechanics, builders, lumbermen, artisans, workmen and laborers who shall perform work and labor upon any building, erection, mining claim, quartz lode, etc., the plaintiff alleges that on the 28th day of December, 1874, the aforesaid corporation hired the plaintiff as its agent, manager and superintendent to perform labor in and about the building, erection and completion of the mill and houses mentioned, and also in working the claims named on the quartz lode, at a salary of \$250 per month.

Does this averment bring the plaintiff within the spirit and meaning of the mechanics' lien law?

The purpose of the legislature in enacting this statute undoubtedly was to secure to the persons therein named compensation for their labor upon the erections therein contemplated, and within the scope of the statute. Its provisions should be liberally construed. It was designed for the protection of workmen who, by their labor or materials furnished, have called property into being or added to its value, to the end that the property itself should be held liable for the labor and materials that produced it. But it is not every one who contributes to the erection of a building or structure that is entitled to a lien thereon. If the contribution was indirect, as if A should loan money to B for the purpose of enabling him to erect a building, and he should with the money thus loaned employ workmen, purchase materials and construct a building, A could not hold a mechanic's lien on the building for the money so loaned. In order to have the lien attach the labor or materials must have been expended on the building itself, and not upon something else that produced it as a result.

From the nature of the plaintiff's employment, as averred by himself, it does not appear that he was an architect or laborer, or that he labored directly in the construction of the buildings, etc., but rather that he was employed by the corporation at a fixed salary to manage and superintend its affairs at the place named. Undoubtedly he had the general oversight of the business of the company, of the workmen employed to labor upon the buildings, etc., and probably kept an account of their time, saw that they per-

formed good service and earned their wages, and at stated times paid them their money, for all of which he rendered an account to the company. His services were useful and necessary, but they contributed only in an indirect manner to the construction and erection of the buildings. He stood very much in the situation of an owner directing and managing works of his own. He was the representative of the corporation, and to the laborers under him he was the corporation at the place where the labor was performed. This was not the kind of service that entitles one to a mechanic's lien. This view of the case is in harmony with the decisions of the supreme court of the State of Missouri, from whence we obtained our mechanics' lien law. In the case of *Blakey v. Blakey*, 27 Mo. 39, the plaintiff brought an action to enforce a mechanic's lien for work and labor done and materials furnished in building a house for defendant. His account was as follows: "To 114 days' services of self in working and superintending building from May 1 up to December 23, 1856, at \$3 per day, \$342." In deciding this case the court says: "The law gives the mechanic, builder, artisan, workman, laborer or other person who may do or perform any work upon, or furnish materials for any building, a lien on the same to secure the payment of the work done or materials furnished, but it has no such elastic power as is claimed for it in this case, and it cannot be stretched to cover, besides the value of the work done and materials furnished, a claim for services performed by the builder for himself in superintending his own workmen."

This superintendent stands in place of the corporation, and to give him a lien for the kind of labor he performed might defeat the liens of the workmen and material men who actually constructed the building, and would be like giving a lien to the corporation itself.

This case is not at all analogous to that of *Alvord v. Hendrie*, ante, 115, decided by this court. In that case there had been a full and complete settlement between the parties, and the amount for which the plaintiff should have a lien upon the property for his labor thereon had been agreed on and determined.

An agent employed to disburse money and pay off hands in the building of a house has no lien for his services, as the statute

was designed to protect the interest of a different class of persons from those agents employed to disburse money. Such services do not come within the spirit or letter of the act. *Edgar v. Salisbury*, 17 Mo. 271; Phillips on Liens, §§ 156, 157.

There is another question, not referred to in the briefs, worthy of great consideration, as to the validity of a joint lien upon separate and distinct parcels of property. See Phillips on Liens, § 376; *Steigleman v. McBride*, 17 Ill. 300; *James v. Hambleton*, 42 id. 308.

The judgment below is affirmed.

Judgment affirmed.

BLAKE, J., did not sit in this case, being disqualified.

BOLEY, appellant, v. GRISWOLD, respondent.

PLEADING — *repugnant facts not admitted by demurrer.* B. alleged in his complaint that G. is "utterly insolvent," and that the sheriff, if he is not enjoined by the court, will pay G. the amount of his judgment against B., over \$7,500. G. filed a demurrer. *Held*, that the demurrer admits the facts, which are pleaded correctly in the complaint, but does not admit the legal conclusions therein stated. *Held*, also, that the first allegation is repugnant to the last, and that the demurrer does not admit that G. is "utterly insolvent."

CASE AFFIRMED. The case of *Griswold v. Boley*, 1 Mon. 545, holding that the property of a married woman is freed from the debts of her husband when her list of the same has been recorded according to law, affirmed.

MARRIED WOMEN — *descent of property.* The wife of G. owned, as her separate property, a judgment which she recovered against B. This action was commenced after her decease. *Held*, that the property descended to her kindred, and that G. is not entitled to the same until her estate has been administered upon and settled.

INJUNCTION — *not granted on application of a party who has not used diligence.* The wife of G. recovered her judgment against B., November 10, 1870. In this month B. filed a motion to retax the costs, which is pending, and also motions to revive two judgments against G., which are pending. About five years afterward, B. commenced this action, and prays for an injunction to restrain the sheriff from selling property to satisfy this judgment until these motions have been heard and determined. *Held*, that B. did not use reasonable diligence to secure the determination of his motions, and that he was not entitled to an injunction. *Held*, also, that B. has a

legal remedy in the statutory proceedings supplementary to execution, if the judgments against G. are revived and G. receives from the officer the amount of the judgment against B.

EXECUTION — *supplementary proceedings.* The enforcement of the Civil Practice Act, relating to proceedings supplementary to an execution, will aid a party to recover money from a debtor who has property in his possession.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J.

JOHNSTON & TOOLE, for appellant.

The common law of England has been adopted by this Territory, and is the rule of decision if it is not in conflict with special enactments. Cod. Sts. 388, § 1.

At common law, a married woman could not hold personal property. If she had this right in Montana, it must have been conferred expressly by statute. There is no law of this kind, and such property coming to the wife after marriage becomes the property of her husband. Tyler on Inf. and Cov. 211, *et seq.* The legislature has not removed this disability from married women, and authorized her to receive property in her own right as "if she were a *feme sole*."

A certain character of property of the wife has been exempted from execution and attachment on account of the husband's debts. Cod. Sts. 521, § 1; *Griswold v. Boley*, 1 Mon. 545. She held and owned it to no greater extent, and could invoke no other remedy. Under the statutes of Montana, a married woman has the personal right to prevent such property from being taken for her husband's debts. The power to own and hold is a condition precedent to the right to dispose of. The legislature has not given this power to married women. Mrs. Griswold had no property which she could devise or transfer. Her rights in the property ceased upon her death.

An innovation of the doctrine of the common law will not be adopted unless the statute is plain and explicit in its terms. 9 Bacon's Abr. 245; 1 Kent's Com. 505; *Wadhams v. American H. M. S.*, 12 N. Y. 415; *Middlebrooks v. Springfield F. I. Co.*, 14 Conn. 304.

Mrs. Griswold could have no creditors as she could make no contracts. No administration of her estate would be necessary. Tyler on Inf. and Cov. 313; *Ransom v. Nichols*, 22 N. Y. 110; *Westervelt v. Gregg*, 12 id. 202.

The legislature cannot deprive the husband of the property of the wife and make it her sole and separate property.

If the judgment against appellants is a proper subject of set-off and Griswold is insolvent, a stay in equity should be had until the issues are tried. The property should be preserved that justice may not be defeated. 1 Sto. Eq. 211, 676; *Clute v. Potter*, 37 Barb. 199; *Hamel v. Grimm*, 10 Abb. Pr. 150; *Erie R. Co. v. Ramsey*, 45 N. Y. 637.

The facts stated in the complaint are to be considered as proved upon this hearing.

W. F. SANDERS, SHOBER & LOWRY and CHUMASERO & CHADWICK, for respondents.

The points made by the appellants have been settled in this Territory in *Griswold v. Boley*. There is only one question to be considered, the ownership of the judgment in *Griswold v. Boley*. It belonged to Mrs. Griswold. Her husband could have no interest in the same until her estate had been administered upon. The property of the married woman is, after her death, a trust for the payment of her debts. Schouler on Dom. Rel. 196-205; *Curtis v. Engle*, 2 Sandf. Ch. 317; *Am. Coal Co. v. Dyett*, 7 Paige, 14. The decisions in New York, before the adoption of the Code, were made under the common law. No set-off could be allowed before the estate of Mrs. Griswold had been settled. *Stoddard v. Butler*, 20 Wend. 520; Cod. Sts. 361, § 252.

BLAKE, J. This is an action brought by the appellants to restrain the collection of an execution until certain issues at law have been heard and determined. The court below sustained the demurrers of the respondents to the complaint and its amendments, and judgment was rendered upon these pleadings for the respondents. In discussing the questions which have been argued by counsel, we must examine carefully the allegations of the complaint according to the established rules. The demurrer neces-

sarily admits the truth of the facts stated in the complaint, so far as they are relevant and well pleaded; but it does not admit the conclusions of law drawn therefrom, although they are alleged. In an exact equipoise, the construction should be against the pleader. Sto. Eq. Pl., §§ 452, 452 *a*; 1 Danl. Ch. Pr. 566.

Hall and Miller, two of the appellants, recovered August 3, 1870, a judgment against Griswold for \$987.75 damages, and \$476.09 costs. On September 3, 1870, an execution was placed in the hands of the appellant Boley, then the sheriff of Jefferson county, who sold, as the property of Griswold, a sufficient amount to satisfy the judgment. The officer returned the execution satisfied, according to law. In another action, a deficiency judgment was entered September 14, 1870, in favor of Hall and Miller, and against Griswold, for \$1,442.71. In the same month, an execution was placed in the hands of Boley, as said sheriff, who sold, as the property of Griswold, a sufficient amount to satisfy the judgment and costs, excepting the sum of \$208.55. The officer returned this execution partially satisfied. Afterward, Sarah M. Griswold, the wife of the respondent Griswold, commenced an action to recover the property sold by the sheriff, or its value, and damages for its detention, and obtained, November 10, 1870, a judgment against the appellants, Boley, Hall and Miller, for \$3,800, and costs. The amount of the costs claimed in the memorandum, which was filed by Mrs Griswold, is \$1,200. Boley, Hall and Miller filed a motion to retax the costs which is pending, and appealed from the judgment that was entered against them. The appellants have filed motions to set aside the returns of the sheriff upon the executions against Griswold, and revive the judgments under which they were issued, and the motions are pending. Mrs. Griswold died before the appeal from the judgment in her favor had been determined. A remittitur on the appeal has been obtained, and an execution has been placed in the hands of the respondent, Bullock, the sheriff of Lewis and Clarke county, for the purpose of satisfying the judgment and costs in the action commenced by Mrs. Griswold. Bullock has levied upon the property of Hall and Miller and threatens to sell the same under the execution.

The appellants pray that the judgment, which was rendered for Mrs. Griswold, may be set off by the judgments recovered by Hall and Miller against Griswold; that the respondents be enjoined from enforcing the execution in the hands of the sheriff, Bullock, until the motions filed by the appellants have been heard and decided; and that appellants may be permitted to pay into court the amount which may be found due to the respondents upon the final determination of this action.

The appellants can have no standing in a court of equity until some of the motions, which are pending, have been determined in their favor and one of the judgments against Griswold has been revived. In *Duncan v. Lyon*, 3 Johns. Ch. 359, Chancellor KENT says: "To authorize a set-off, the debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated. They must be certain and determinate debts." This doctrine is supported by the authorities. *Holden v. Gilbert*, 7 Paige, 208; *Harris v. Palmer*, 5 Barb. 106; *Miller v. Gilman*, 7 Cowen, 469; 2 Sto. Eq. Jur., § 1439, and notes; Kerr on Injunc. 65; *Wells v. Clarkson*, ante, 230, 379. It has been held that, to a judgment, there can be no set-off of a debt which is not in a judgment; and the judgment must be a subsisting and unsatisfied claim, and the right of the party applying for this remedy must be free from doubt. Waterman on Set-off, §§ 322, 324, 329 and cases there cited.

The appellants rely upon two facts to procure the injunction restraining the collection of the execution against them, and one of the material allegations of the complaint is that Griswold is "utterly insolvent." We think that the complaint states facts regarding this subject which are inconsistent with each other. It is a well-settled rule that the demurrers of the respondents do not admit matters of law or of fact which are repugnant to each other. 1 Danl. Ch. Pr. 567; Sto. Eq. Pl., § 656. The complaint also alleges that Griswold is the sole and exclusive owner of the judgment recovered by Mrs. Griswold, that Mrs. Griswold died and owed no debts, that Griswold has paid all the demands against her estate, and that the sheriff, Bullock, will pay to Griswold the amount of this judgment and the costs, if he is not enjoined by the court. It appears that the amount of the judgment, costs and interest ex-

ceeds \$7,500. Can the appellants aver that Griswold is "utterly insolvent," when they pray that he may be restrained from collecting over \$7,500, on which there is no incumbrance? A court cannot tolerate this conduct by the parties that are seeking equitable relief. Under the authorities which have been cited we must disregard the allegation of the appellants that Griswold is "utterly insolvent," and deny the prayer for any relief which could be granted on this ground.

The other fact which the appellants must establish in this action is, that Griswold is the owner of the judgment which belonged to his wife before her decease. The complaint does not state with certainty the means by which Griswold became entitled to this property. Mrs. Griswold died intestate, and there has been no administration upon her estate, and Griswold did not acquire the judgment by purchase, gift or devise. The appellants maintain that this judgment and all rights under it vested in Griswold upon the decease of his wife according to the common law. The question has been settled by this court in the appeal, which has been referred to. *Griswold v. Boley*, 1 Mon. 545; S. C., 20 Wall. 486. In the opinion, Mr. Chief Justice WADE says: "When a list of the separate property of the wife is recorded, as required by the statute, it is entirely freed from the debts of the husband as fully and completely as if the marriage relation did not exist. When the statute is complied with its prohibition is absolute." The court decided that Mrs. Griswold **had** taken the proper steps to protect her property under the laws of the Territory. Upon her decease her real and personal estate would descend and be distributed to her kindred in the course defined in the statutes. Cod. Sts. 361, § 252. Griswold is not entitled to the property of his deceased wife until her estate has been administered upon and a final settlement has been made in the probate court. At the present time it does not appear that the appellants can maintain this action, because we are satisfied that Griswold did not have a personal title to the judgment against them.

But if we assume that Griswold is the owner and possessor of this judgment, what are the rights of the appellants in this proceeding? Hall and Miller filed the motions to revive their judgments against Griswold, and **retax the costs in the suit brought**

against them by Mrs. Griswold in 1870, about five years before the commencement of this action. The amount which might have been affected by these motions appears to exceed \$6,300. During this period the appellants made no effort to secure the trial and adjudication of these matters and they remain undecided. The justices of this court appoint and fix the times and places of holding the district courts by virtue of the fourth section of the amendment to the Organic Act. We must take judicial notice of the terms at which these motions could have been heard and determined. 1 Greenl. Ev., § 6. The appellants have postponed the consideration of these questions, and offer no explanation for this delay or refusal to obtain a final decision of matters which affect so vitally their interests. We know of no reason why these motions should not have been granted or refused before this action was commenced, if the appellants had asked for a hearing.

Upon what grounds are the appellants entitled to enjoin the sheriff from enforcing the execution against their property until the motions can be passed upon? Lord CAMDEN says that nothing can call forth a court of equity "into activity but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced." 2 Sto. Eq. Jur., § 1520, n. 3. Have the appellants exhibited the "conscience, good faith and reasonable diligence" in the prosecution of their rights which the circumstances of the case demanded? A court of equity will not interfere by injunction to restrain a party from executing his judgment, unless the injured party has been prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, from availing himself of the facts in a court of law, which prove it to be against conscience to enforce the judgment. 2 Sto. Eq. Jur., §§ 882, 887; *Duncan v. Lyon, supra*. The appellants have been guilty of negligence in the proceedings which have been described, and the court rightly denied their prayer for an injunction to cause further delay. *Upton v. Tribilcock*, 91 S. C. 55, and cases there cited.

If the judgments against Griswold are revived by the appellants they cannot allege that they are "utterly remediless." The chapter of the Civil Practice Act regulating proceedings supplemen

tary to execution, points out the manner of collecting the judgments against Griswold, if the regular process is not satisfied, and Griswold receives the amount of the execution in the hands of the officer, Bullock.

Judgment affirmed.

RYAN, respondent, v. KINNEY, appellant.

PRACTICE — *sufficiency of pleading.* In a suit on an administrator's bond the averment that the probate court of the proper county had found assets in the hands of such administrator belonging to an estate, and had made an order for payment of a certain sum to a particular creditor of said estate coupled with a refusal of the administrator to pay such creditor according to order, is sufficient to show a breach of condition of the bond, and to maintain an action therefor.

PROBATE COURT — *jurisdiction — remedy — collateral proceedings.* The jurisdiction of probate courts over the distribution of the estates of deceased persons is exclusive, and all orders and decrees relating thereto are final and binding upon all parties to the same. The only remedy is by appeal as provided by statute. Such orders and judgments cannot be impeached in any collateral proceedings except for fraud.

Appeal from First District, Madison County.

S. WORD, for appellant.

J. G. SPRATT, for respondent.

WADE, C. J. This is an action by a creditor of the estate of John S. Rockfellow, upon the administrator's bond, for a breach of the conditions thereof. The complaint alleges the execution of the bond, the receipt of assets by the administrator, the order and adjudication of the probate court that he pay to Stevens and Ryan the sum of \$2,367.83, the assignment of Stevens to Ryan of his interest therein prior to the date of the order; that Ryan, as the owner of such claim and creditor of the estate, is entitled to receive the amount thereof from the administrator; the demand upon the administrator to pay, and his neglect and refusal so to do.

There was a demurrer to the complaint, which was overruled, and judgment was rendered for plaintiff upon the proof.

The defendants insist that the demurrer should have been sustained, and contend that the complaint shows no breach of the bond; that it does not show that the demand of plaintiff had been proved to and duly allowed by the probate court, and that it does not show the whole amount of the assets of the estate, nor that plaintiff was entitled to receive the amount that he claims on a distribution thereof.

The statute defining the duties of the probate court and administrator upon the rendition of an account, provides: "At every settlement the court shall ascertain the amount of money of the estate which has come to the hands of such executor or administrator from all sources, and the amount of debts against the estate, and if there be not sufficient to pay the whole of the debts and expenses of administration, the money remaining, after paying the expenses of administration, shall be apportioned among the creditors according to this act; and the court shall order such executor or administrator to pay the claims allowed by the court according to such apportionment, reserving apportionments made on claims which remain undecided until decision be had thereon." Cod. Sts. 356, § 227.

This statute contemplates an adjudication by the probate court, wherein shall be ascertained the number of creditors, the amount, nature and priorities of their respective claims, the assets belonging to the estate subject to distribution, and an order upon the administrator to pay the same to the persons adjudged entitled to receive under the order and findings of court. From such an adjudication the statute provides (Cod. Sts. 367, § 283) for an appeal to the district court. After such an adjudication by the probate court, the amount of assets belonging to the estate, who are creditors thereof, the nature and amount of their claims, and what each is entitled to receive under the order, cannot be inquired into in a collateral proceeding. The remedy for any one feeling aggrieved by the adjudication and order is by appeal.

The averment of the complaint, after showing that the administrator received assets belonging to the estate, is, "that on the 16th day of December, A. D. 1873, the probate court of Mad

ison county found in the hands of said Kinney the sum of \$2,367.83, which he, the said Kinney, as such administrator, was adjudged and ordered to pay over to Stevens and Ryan, according to law." This averment shows that there had been a hearing by the court, wherein was ascertained the amount of the debts, the number of the creditors, and the assets applicable thereto; and wherein it was further found and adjudged that the administrator held in his hands belonging to the plaintiff the sum of \$2,367.83, which he was ordered to pay to him, and his failure so to do upon demand was a breach of the condition of his bond as administrator.

This hearing, finding and order of the probate court were an adjudication, a judgment or decree. And whether such findings and adjudication were correct or incorrect; whether the plaintiff was a creditor of the estate; whether his claim had been approved and allowed for more than he was entitled to, or whether there was any irregularity in the adjudication, cannot be inquired into in a collateral proceeding. The remedy given by the statute for a review of all these matters is by appeal to the district court, and until reversed or modified the order and judgment of the probate court are final, it having jurisdiction of the subject-matter and of the parties.

In *Lawrence v. Englesby*, 24 Vt. 42, the court say, "that the decrees of the probate court are conclusive, when acting within its jurisdiction, upon all persons." In that case the defendant had been appointed administrator of an estate by the probate court, and no appeal had been taken from the order making his appointment, and the supreme court held that they could not, in a collateral way, review the correctness or propriety of a decree of a court of probate acting within its jurisdiction. Whether the defendant was a proper person to be appointed administrator, and whether a request by only part of the next of kin was sufficient to warrant the grant of letters, were questions properly arising before the probate court, and if petitioner felt aggrieved he should have appealed. Bigelow on Estop. 159.

In *Loring v. Steineman*, 1 Mete. 204, SHAW, C. J., says: "These circumstances were, that the decree was made upon motion and representation of the administrator himself, without the application of any party in interest; that no notice was given,

and that no proof of the facts of the existence or death of the collateral relations of the deceased intestate was laid before the probate court. It rather appears to have been a decree *pro forma*, taken for the purpose of bringing the case before this court by appeal."

* * * "We can entertain no doubt that the judgment of the probate court, duly made after such notice as the statute requires, or, if no notice is required, then after such notice as the court in its discretion, acting upon the circumstances of the case, may think proper to order, must be deemed in its nature so far conclusive as to protect an administrator acting in good faith in conforming to it. The distribution of an intestate estate is within the peculiar and exclusive jurisdiction of the probate court, exercising in this respect the jurisdiction of the ecclesiastical courts. The administrator is compellable to submit to it. It is part of the obligation of the bond which he is by law bound to give on taking administration, to distribute the residue of the estate as the court of probate shall order. A refusal to pay a distributive share on demand is *ipso facto* a breach of the bond, and a distributee, after demand of payment and refusal, may forthwith bring an action on the probate bond for his own benefit without any permission or authority of the judge. In such action on the bond a decree of distribution not appealed from is conclusive of the right of the distributee, and its validity cannot be drawn in question by any pleading or proof."

The order of the probate court on the administrator, to pay the plaintiff, made after full hearing and adjudication of the estate, and not being appealed from, remains in full force. It imports absolute verity, gives the plaintiff the right to maintain this action, and its validity cannot be questioned by any pleading or proof on the part of the defendants, unless they can show that the order was obtained by fraud, and this is not alleged. *Homer v. Fish*, 1 Pick. 435.

Judgment affirmed.

BLAKE, J., having been of counsel in the court below, did not participate.

GANS, appellant, v. WOOLFOLK, respondent.

NONSUIT WHEN COMPLAINT HAS SEVERAL CAUSES OF ACTION—*judgment modified*. G. brought this action to recover from W. two distinct sums of money; one for certain costs and the other for the value of certain property. W. admitted that he owed the costs. On the trial the court sustained W.'s motion for a nonsuit. *Held*, that the judgment of nonsuit should not be entered when the answer admits one cause of action in the complaint. *Held*, also, that the motion relating to the second cause of action was properly granted, and this court modified the judgment without granting a new trial, as it could administer justice to the parties.

TENDER OF BULKY GOODS—*waiver of tender*—*place of delivery*. G. attached 600 yards of carpet, fastened to the floor of A.'s hotel, as the property of A. B. sued the officer to recover the carpet, and gave him an undertaking executed by W. for its return and the payment of any damages, "if return thereof be adjudged." The property was then delivered to B. The officer recovered judgment against B., and W. immediately served on G. and the officer written notices that the carpet would be delivered to them at the hotel, and requested them to go there and receive it. G. and the officer refused to receive the property. *Held*, that the carpet is a bulky article which could be delivered at a convenient place designated by the parties entitled to it. *Held*, also, that W. and the other persons, who were required to tender the carpet, could select a suitable place for its delivery upon the failure of G. or the officer to designate the same, and the refusal of G. and the officer to receive the property at the place so selected was adjudged in this action a legal return thereof. *Held*, also, that the allegation of the tender of the carpet to G. by W. is established by testimony showing that G. refused to receive it under the foregoing facts.

EVIDENCE—*proof of negative averment*—*satisfaction of undertaking*—*value of goods*. G. brought this action upon said undertaking, and alleged in the complaint that "no return of the property has been had." *Held*, that the burden of proof rests upon G. to establish this negative averment. *Held*, also, that the condition of said undertaking would be satisfied by said tender of the carpet to G. and the officer, and the payment of the judgment recovered by the officer against B. *Held*, also, that testimony that the carpet is worthless, or has depreciated in value, is not competent.

COSTS—*effect of admission of one cause of action*. The four hundred and forty-second section of the Civil Practice Act authorizes a defendant to serve upon the plaintiff an offer to allow judgment to be taken against him for a certain sum, and the plaintiff cannot recover costs if he fails to obtain a more favorable judgment. W. admitted, in his answer, that he owed the amount stated in one cause of action in G.'s complaint, and G. did not "obtain a more favorable judgment." *Held*, that W. did not make the offer described in the statute, and G. recovered his costs.

Appeal from Third District, Lewis and Clarke County.

THIS action was tried before WADE, J., who entered the judgment of nonsuit.

W. F. SANDERS and CHUMASERO & CHADWICK, for appellants.

A new trial must be granted. The answer admits that respondents owe the appellants \$184 and interest, and judgment should have been entered for this sum.

When appellants introduced the undertaking sued on, they could rest their case. The judgment for the return of the property was admitted, and the burden of proving that the conditions had been performed devolved upon respondents. The respondents were entitled to open and close, and there could be no nonsuit. *Huntington v. Conkey*, 33 Barb. 220; *Ayrault v. Chamberlain*, id. 229; *Elwell v. Chamberlin*, 31 N. Y. 612; *Millerd v. Thorn*, 56 id. 405; Bouv. Inst., § 3047; *Scott v. Hull*, 8 Conn. 303.

The appellants proved that the property had not been returned. They intended to prove by the witness, Sandford, that the carpet had been destroyed, and that respondents could not return it. The court ruled that this evidence was incompetent, and sustained the motion for a nonsuit because appellants did not prove the matter they proposed to by this witness. Respondents cannot take advantage of the lack of evidence when they excluded it by their objection. They are estopped by their conduct. *Thompson v. McKay*, 41 Cal. 230.

The respondents made a paper offer to return the property, and no actual offer. They were trespassers in holding the property after the judgment had been rendered for its return to appellants. They are liable upon their undertaking and cannot defeat this action by making an offer on paper to return the carpet. *Sweeney v. Lomme*, 22 Wall. 208.

H. M. PORTER and E. W. TOOLE, for respondent.

Appellants were required to prove that respondents did not deliver the carpet. When a right of action is grounded on a negative averment, it must be proved. 1 Greenl. Ev., § 78.

The offer to return the goods at the International Hotel was a

compliance with the undertaking. Bouv. Dict., "Return;" *Hisler v. Carr*, 34 Cal. 641.

Evidence of waiver of tender is competent to support averment of tender. The refusal to receive the goods was a waiver of a perfect tender. 2 Greenl. Ev., § 603; *Slingerland v. Morse*, 8 Johns. 474; *Munn v. Barnum*, 24 Barb. 283; *Hazard v. Loring*, 10 Cush. 267; *Mutual L. I. Co. v. Wager*, 27 Barb. 367.

Appellants could not refuse to receive the carpet if it was depreciated or worn out. Compensation for the depreciation is allowed as damages. *Allen v. Fox*, 51 N. Y. 562.

The law presumes that the value of the goods was found at the date of the trial by the jury, \$1,900. *Brewster v. Silliman*, 38 N. Y. 423; *Young v. Willet*, 8 Bosw. 486; *Allen v. Fox*, 51 N. Y. 562. No issue as to the value of the carpet was made in the pleadings.

The case of *Sweeney v. Lomme* is not applicable. After Wyttenbach tried to comply with the judgment by offering to return the goods, he ceased to be a trespasser. 2 Kent, 692; *La Farge v. Rickert*, 5 Wend. 187.

Appellants did not ask for judgment as to the sum admitted to be due. The nonsuit was upon the issues submitted. The offer to permit judgment for \$184 was not accepted by appellants, who are therefore liable for the costs. The court can modify the judgment in any particular. Civ. Pr. Act, § 378.

BLAKE, J. The appellants commenced an action in July, 1871, against G. J. Germaine to recover \$1,868.17, and procured a writ of attachment. W. L. Steele, then the sheriff of Lewis and Clarke county, levied upon the carpet in the International Hotel, in Helena, as the property of Germaine, under the writ. H. Wyttenbach brought an action against the officer to recover the possession of the property, and delivered an undertaking, executed by the respondents, with the following condition: "For the prosecution of said action for the return of the property to the defendant, if return thereof be adjudged, and for the payment thereof to the defendant of such sum as may, for any cause, be recovered against the said plaintiff." The carpet was delivered afterward to Wyttenbach, according to the provisions of the stat-

ute for the claim and delivery of personal property. Civ. Pr. Act, title 5, ch. 2. On the trial of the action between Wyttenbach and Steele, judgment was entered March 6, 1873, that Steele recover the possession of the property, or \$1,900 in case a delivery could not be had, and the costs, amounting to \$184.90. Steele assigned this judgment and the undertaking to the appellants. The appellants obtained a judgment against Germaine November 10, 1871, for \$1,929.72 damages, and \$34 costs. No part of this judgment has been paid by Germaine or any person. At the time that the attachment writ was served the carpet, comprising six hundred yards, was tacked to the floor of the hotel and never removed by the sheriff or the appellants. The building and the carpet were destroyed by fire January 9, 1874.

The appellants bring this suit against the respondents upon their undertaking to recover \$1,964.62 and interest from November 10, 1871, and \$184.90 and interest from March 6, 1873, the said sums being the amounts of the judgments recovered by the appellants against Germaine, and by Steele against Wyttenbach. The respondents admit, in their answer, that they owe the judgment for \$184.90 with the interest thereon, and allege that they are ready and willing to pay the same. They deny that they owe the sum of \$1,964.42, or any part thereof, and aver that, upon the rendition of the judgment against Wyttenbach, the carpet was returned and delivered to the appellants, at the hotel, in the same situation in which it was found when the officer levied thereon; and that the appellants refused to receive the property at any place. These allegations are denied by the appellants in their replication to the answer.

Upon the trial the court sustained the motion of the respondents for a nonsuit, and judgment was rendered against the appellants for the costs of the suit. This motion should not be granted when a cause of action is proved or admitted by the pleadings. *Goulding v. Hewitt*, 2 Hill, 644; *Van Rensselaer v. Jewett*, 2 N. Y. 135. The appellants were entitled to a judgment against the respondents upon the pleadings for \$184.90, and the interest thereon from March 6, 1873, and certain costs. The court erred in granting the motion relating to this cause of action, and entering the judgment against the appellants for the costs.

This error does not necessarily entitle the appellants to a new trial upon the issues between the parties. The complaint contains two distinct causes of action, arising in the cases of the appellants against Germaine, and Wytenbach against Steele. The respondents admitted their liability upon one of the causes of action, and proceeded to a trial upon the other subject of controversy respecting which all the evidence was offered on the trial. A judgment of nonsuit may be entered by the court, upon the motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury. Civ. Pr. Act, § 184. The term "case" does not include the entire action stated in the complaint. Several causes of action may be united in the same complaint, and the defendant may demur to one or more of the causes and answer the remainder, and the defenses must refer to the cause of action which they are intended to answer. Id., §§ 52, 59, 72. We are of the opinion that a judgment of nonsuit may be entered when the plaintiff fails to establish by the proof one of his causes of action, and that no other cause of action is affected by the decision, and the same can be tried and submitted to the jury.

We will consider the ruling of the court in granting the nonsuit upon the cause of action in which the appellants seek to recover \$1,964.62 and the interest. What facts were the appellants required to prove to maintain the material allegations of the complaint? This action is founded upon the alleged failure of the respondents to perform the conditions of their undertaking, and the complaint states that "no return of the property has been had," and that no part of the judgment against Wytenbach has been paid. Upon these issues the appellants must establish the negative allegation that "no return of the property has been had," in order to sustain this cause of action. 1 Greenl. Ev., § 78; *Machebeuf v. Clements*, 2 Col. 36, affirmed in 92 S. C. 418. The assignment of the judgment recovered by Steele against Wytenbach vested in the appellants the rights of the sheriff upon the undertaking made by the respondents. *Bowdoin v. Coleman*, 3 Abb. Pr. 431; *Lomme v. Sweeney*, 1 Mon. 584; S. C., 22 Wall. 208.

The evidence that was introduced by the appellants to maintain this allegation is set forth in the transcript. One of the appellants

testified that the carpet had never been returned to them, and he did not remember whether it was offered to him by the respondents and refused after the judgment was entered against Wyttenebach. Steele testified that the property was not returned to him; that his term of office as sheriff expired in December, 1871; that in April, 1873, one of the respondents came to him on Main street, Helena, between the store of the appellants and the International Hotel, at a point about seventy-five or one hundred yards from the hotel, and handed him a written notice surrendering the carpet; that one of the respondents told him that the carpet was rolled up at the hotel, the place where it was attached, and asked him to go there and receive it; that he refused to receive the property, as he was out of office, and would have nothing to do with it; that he then went to one of the respondents and delivered him the notice, and he said he had received a similar notice; and that he (Steele) had no place of business in Helena at this time, and was living about six miles from Helena. The following statement appears in the transcript: "There was no conflict in the proof that the tender as claimed by the defendants (respondents) was made immediately after the rendition of the judgment in the replevin suit and on the very day."

In reviewing the action of the court in granting the nonsuit, this court will consider as proven every fact which the testimony tended to prove. *Herbert v. King*, 1 Mon. 475. What does the evidence tend to prove? Did the respondents make a legal offer to return the goods to Steele or the appellants? Did the appellants waive an actual delivery of the property? The evidence of the waiver of a tender by the appellants is competent and sufficient to support the allegation of a tender. *Holmes v. Holmes*, 9 N. Y. 525. The carpet was a bulky and cumbersome article and the respondents were not required to tender it, like money, to the appellants wherever found. They were obliged to deliver the property at some particular place. If the appellants neglected or refused to appoint the place the respondents had the right to select it, with a reasonable regard for the convenience of the appellants, and there deliver the goods. 2 Pars. on Cont. 650; 2 Greenl. Ev., §§ 609, 610. In *Slingerland v. Morse*, 8 Johns. 474, the court held that an offer to deliver bulky goods at the house where they

were stored was sufficient, and that no other offer was requisite. The articles had been distrained at this place and left there in the first instance, and it was considered that there was a peculiar fitness in the house for the purpose of the tender. The carpet remained in the hotel during the pendency of the proceedings which have been mentioned. The respondents designated this building as a suitable place for the delivery of the property and the store of the appellants was in its neighborhood. The appellants did not name any other place and the respondents exhibited in this matter a reasonable regard for the convenience of all the parties. Under the circumstances the tender made by the respondents was sufficient, and the appellants refused to accept the carpet at their peril. The evidence shows clearly that a return of the property was had within the meaning of the law, and the appellants failed to establish this cause of action.

The appellants insist that the court erred in refusing to allow a witness to testify concerning the condition of the property from 1871 to 1873 and in 1873. It appears that this evidence was offered for the purpose of showing the actual value of the carpet at the time of the tender, and that the same was worn out and worthless. This testimony does not support any allegation in the complaint and contradicts the averments of the appellants in their pleadings. The main issue, which they presented for trial in this action, was the failure of the respondents to return to them the property in controversy. When it had been proved to the satisfaction of the court that the carpet had been tendered and refused, the appellants were not permitted to introduce a new fact, which is not referred to in the pleadings, and found thereon a legal obligation. The court properly excluded this testimony which could not be heard without violating the sound rule that the *allegata* and *probata* must correspond.

There is another fatal objection to the introduction of this evidence. The respondents were required to return the goods after the judgment had been entered against Wytttenbach, if it was in their power to do so. *Caldwell v. Gans*, 1 Mon. 570. The appellants could not impair the rights of the respondents by a refusal to accept the carpet, because it had been injured or reduced in value while it was in the possession of Wytttenbach. On the day the

tender was made the judgment had been rendered against Wytenbach for \$1,900, as the value of the property, in case a delivery could not be had. The validity of this judgment has not been questioned, and we might presume that the goods were worth \$1,900 at the time of the trial according to the finding under the statute. Civ. Pr. Act, § 217. The oral testimony could not be admitted to contradict this judgment. *Brewster v. Silliman*, 38 N. Y. 423; *N. Y. G. Co. v. Flynn*, 56 id. 653. In *Allen v. Fox*, 51 id. 562, the court said: "Now, suppose the property has been badly depreciated, intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it, if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him." This doctrine is sustained by the cases which are cited in the opinion. This court has decided that a party who is entitled to the possession of personal property can recover the value of its use from the time he was deprived of it to the day of the trial. *Morgan v. Reynolds*, 1 Mon. 163. The case of *Douglass v. Douglass*, decided recently by the court of last resort in the United States, is in point upon the questions which have been discussed. 21 Wall. 98. The goods had been taken from the defendant by the officer under the writ *de retorno habendo* and tendered to the plaintiff, who refused to receive them because they were "much damaged and altered in condition, and of materially less value than when they were delivered to said defendant." Mr. Justice SWAYNE says: "The seizure and tender satisfied the judgment of return and the defendant's obligation. *Carrico v. Taylor*, 3 Dana, 33. Neither could be revived by the plaintiff's refusal to receive the property. The refusal was of no legal consequence. If the defendant injured the property, or culpably suffered it to become injured while it was in his possession, a remedy must be sought in some other appropriate proceeding. It cannot be had in a suit on the bond." The condition of this bond is similar to that of the undertaking in this action. The damages intended by this undertaking are those that were recovered by Steele against Wytenbach. The respondents would have satisfied the condition of their undertaking by the payment of the judgment for \$184.90 after they tendered the carpet to the appellants. *Stevens v. Twite*, 104 Mass. 336; *Hisler v. Carr*, 34 Cal. 645.

The appellants claim that they are entitled to a new trial on account of the error of the court in granting the nonsuit, and that we cannot distinguish its effect upon the different causes of action. This position is not tenable. Appellate courts can modify an erroneous judgment without granting a new trial when the facts are before it and justice can be done between the parties. *Atherton v. Fowler*, 46 Cal. 320. The respondents did not serve upon the appellants an offer to allow judgment to be taken against them for any sum. Civ. Pr. Act, § 442. The costs of the action must follow the judgment for the appellants for the amount which is due to them. Civ. Pr. Act, § 546. It is therefore ordered that the judgment of the court below be modified accordingly, and that judgment be entered for the appellants for the sum of \$184.90, and interest thereon from March 6, 1873, to the day of the trial, and the costs of the suit.

Judgment modified.

McKINNEY, respondent, v. POWERS, appellant.

PRACTICE — *exceptions to instructions.* Where no exceptions were taken to the instructions of the court on the trial below, and properly saved at the proper time, and in the proper way, they will not be regarded in the appellate court.

Appeal from Third District, Lewis and Clarke County.

CHUMASERO & CHADWICK, for appellant.

SHOBER & LOWRY, for respondent.

WADE, C. J. The alleged errors complained of in this action arise upon the instructions of the court to the jury. The record shows that no exceptions were taken to the instructions as given. We have repeatedly held that this court will not consider the correctness or incorrectness of instructions to the jury, unless exceptions were properly taken and saved at the proper time. See *Griswold v. Boley*, 1 Mon. 545.

Objections to instructions should be specifically pointed out before the case is finally submitted to the jury. The court below should have an opportunity to correct any alleged errors in the instructions, and this can only be done when such alleged errors are designated, before the case goes to the jury. Obviously, this opportunity was not presented to the court in this case. The instructions went to the jury without objection, and it is now too late to assign errors upon such instructions, no exceptions having been taken at the proper time. Judgment is affirmed.

Judgment affirmed.

TERRITORY, respondent, v. PERKINS, appellant.

CRIMINAL LAW — *continuance*. The provisions of the Civil Practice Act relating to the postponement of the trial of civil actions are applicable to criminal cases.

SAME — *admissions by district attorney*. The district attorney has the right to admit, in behalf of the Territory, that absent witnesses will testify to the facts stated in the affidavit of the defendant for a continuance.

CONTINUANCE OF CRIMINAL CASE — *discretion*. The judgment in a criminal case will not be reversed for the refusal of the court to postpone the trial, if there has not been an abuse of judicial discretion.

EVIDENCE — *disposition of injured party in criminal case*. Upon the trial of an indictment, charging the commission of an assault with intent to commit murder, when the testimony is direct and the defendant and injured party are witnesses, evidence that the injured party is a vicious and revengeful man, and in the habit of carrying and drawing a pistol and getting the drop on his adversary, is not admissible.

ASSAULT WITH INTENT TO COMMIT MURDER — *form of verdict*. The statute does not divide into degrees the crime of an assault with intent to commit murder, and the following verdict, under an indictment charging this offense, is sufficient: "We, the jury, find the defendant guilty, as charged in the indictment."

Appeal from Third District, Lewis and Clarke County.

THE offense described in the indictment was committed in Fort Benton, Choteau county. The case was tried before WADE, J., in Lewis and Clarke county, to which Choteau county is attached for judicial purposes.

JOHNSTON & TOOLE and SHOBER & LOWRY, for appellant.

The court erred in overruling defendant's motion for a continuance, upon the agreement of the district attorney, that he would admit that Marshall, if present, would testify to the facts in the affidavit. *People v. Diaz*, 6 Cal. 249; *People v. Vermilyea*, 7 Cow. 383; *Brill v. Lord*, 14 Johns. 341; *People v. Kohle*, 4 Cal. 198; *Miller v. State*, 9 Ind. 340; *Wheeler v. State*, 8 id. 114.

The verdict is insufficient. The jury did not find the degree of the offense as contemplated by the statute. *Territory v. Stears*, ante, 324; *State v. Reddick*, 7 Kan. 154; *State v. Moran*, 7 Iowa, 236; *State v. Redman*, 17 id. 329; *McGee v. State*, 8 Mo. 495; *State v. Gates*, 20 id. 400; *People v. March*, 6 Cal. 543.

The appellant used great diligence to procure his testimony. Reasonable time should have been given to enable him to procure the attendance of his witnesses. *Ogden v. Payne*, 5 Cow. 15; *Mercer v. Sayre*, 7 Johns. 306.

The provisions of the Civil Practice Act relating to admissions, that a witness, if present, would testify to certain facts, are applicable only when the Territory seeks a continuance. They do not apply when the defendant makes the application.

In all criminal prosecutions, the accused is entitled to compulsory process to obtain witnesses in his favor. Sixth Amend. U. S. Const.; *Webster v. Reid*, 11 How. 437. This amendment in this Territory is of as much import as if it was embodied in the Organic Act. 2 Sto. on Const., §§ 1782, 1789; id., § 1325; *Kleinschmidt v. Dunphy*, 1 Mon. 118.

The court erred in admitting testimony to impeach Marshall.

J. K. TOOLE, District Attorney, Third District, for respondent.

The affidavit of appellant for continuance was insufficient. The threats were not communicated to defendant before the affray. *People v. Scoggins*, 37 Cal. 676. The admission of the affidavit by the district attorney removed the cause of continuance, if any existed. *Thompson v. State*, 5 Kan. 161; *State v. Dickson*, 6 id. 218; *Comerford v. State*, 23 Ohio St. 599. The court could refuse a continuance in its discretion.

The verdict was good and in accordance with the instructions asked for by defendant. Under the indictment, there could not be a conviction of different degrees, as there are none under the statute. There is but one punishment for the crime charged, and there is no reason for ascertaining the degrees.

If the court is satisfied that no other verdict could have been found, even if the testimony of the absent witness had been given, the judgment should be affirmed. *Adell v. State*, 34 Ind. 543.

JOHNSTON & TOOLE and SHOBER & LOWRY, for appellant in reply.

The evidence of the bloodthirsty character of Solomon, as well as his reputation for truth, was material evidence for the appellant. *Rose. Cr. Ev.* 95; 1 Archb. 901; 1 Bish. Cr. Law, 382.

When good cause for a continuance exists, there is no precedent for compelling a trial in criminal cases upon the admission of the district attorney, except by express statute. We have no such statute. The only question is this: Has the party applying for a continuance made out good grounds therefor?

The appellant and Solomon were both armed with deadly weapons, and the evidence of the character and reputation of Solomon is material to show the jury who committed the first assault. The accused might act under the reasonable belief that he must slay Solomon to save himself from being murdered. *Stokes v. State*, 53 N. Y. 164.

BLAKE, J. The appellant has been indicted for assault upon M. Solomon with intent to commit murder, and convicted and sentenced to be confined in the Territorial prison. The court overruled the motions for a new trial and in arrest of the judgment, and Perkins appealed. We will examine some of the errors which have been assigned and are discussed in the briefs of the counsel for the appellant.

It is claimed that the court erred in denying the motion of the appellant for a continuance of the case until the succeeding term. The alleged offense was committed February 12, 1875, the indictment was filed May 5, 1875, and the appellant obtained, on the

same day, subpoenas for witnesses. The motion and affidavit for a postponement of the trial were filed May 12, 1875, in order to enable the appellant to procure witnesses to prove the following facts: That the appellant had been informed by J. Marshall that Solomon had threatened to take the life of the appellant, and the appellant had better be on his guard lest he should do so; that Solomon was a vicious and revengeful man, and in the habit of carrying and drawing a pistol and getting the "drop" on his adversary; and that the reputation of Solomon for truth and veracity was bad among his neighbors. The witnesses lived about 120 or 140 miles from the place of the trial. It was shown by an affidavit that Marshall was then absent in Idaho Territory and beyond the process of the court. The district attorney announced, May 13, 1875, that he was ready to proceed to the trial of the case, and would admit that Marshall, if present, would testify to the facts set forth in the affidavit, subject to impeachment and contradiction. A jury was impaneled, and rendered a verdict in the action, May 17, 1875.

The statute provides that the court may grant a continuance for "good cause," and that "any cause which would be considered a good one for a continuance in a civil case shall be considered sufficient in a criminal action." Crim. Pr. Act, § 270. The party who desires the continuance must file his affidavit, "showing good cause therefor." § 269. A motion to postpone the trial of a civil case, on account of the absence of evidence, must be made upon affidavits showing that the testimony is material and that due diligence has been used to procure it. If the adverse party admits that the evidence, which the moving party expects to obtain, be considered as actually given on the trial, "the trial shall not be postponed." Civ. Pr. Act, § 194. It will be seen that the legislative assembly has made these provisions of the Civil Practice Act applicable to criminal proceedings. After the district attorney had admitted that Marshall would testify to the facts stated in the affidavit of the appellant, the court could not postpone the trial for the purpose of securing his attendance as a witness. There would not have been a "good cause" for the continuance of a civil case under the circumstances, and hence the cause alleged for the postponement of this criminal action

must be considered insufficient. The counsel for the appellant have cited authorities in support of the proposition that the court had no right to refuse to continue this action, and that the admission of the district attorney has no legal weight. They are not applicable upon this appeal, because the ruling complained of is regulated by the laws of the Territory.

There are other facts which appear in the affidavit of the appellant, and are not affected by the action of the district attorney and must be examined. The granting or refusing of a motion for the continuance of a criminal case rests in the sound discretion of the court below, and the judgment will not be reversed unless there has been an abuse of judicial discretion. *Nevada v. Chapman*, 6 Nev. 320; *Nevada v. Rosemurgey*, 9 id. 308; *People v. Williams*, 24 Cal. 38, and cases there cited; *People v. Jocelyn*, 29 id. 563; *People v. Mortimer*, 46 id. 120. Mr. Bishop says that "the motion for a continuance is addressed to the judicial discretion of the court, and it is of the class which are not usually revised by a superior tribunal; though in some of our States the decision on such a motion will be adjudged to have been erroneous, when a strong case is made out." "In general the rules governing a question of this sort are the same in criminal cases as in civil." 1 Bish. Cr. Pr., § 1020. In *People v. Mortimer*, *supra*, the court holds that it is not an abuse of judicial discretion to deny the application for a continuance, if the circumstances tend to cast suspicion on the good faith of the defendant and induce the belief that he is acting for delay. This is not a new question in the Territory, and this court has decided that the refusal to grant a continuance will not be reviewed unless there has been an abuse of judicial discretion. *Black v. Appolonio*, 1 Mon. 345; *Wormall v. Reins*, id. 630.

We do not know the reasons which governed the court in its action upon the motion before us and consider only one question. Did the court abuse its discretion in this ruling? Was the evidence sought to be obtained material to the appellant? We have already determined that there was no error in the ruling upon the affidavit relating to the testimony of Marshall under the statute, but the evidence of the appellant upon the trial vindicates the action of the court. He testified upon his cross-examination as

follows: "I paid no attention whatever to what Marshall said. It never occurred to me until after the shooting." The appellant testified further that the alleged threats were communicated to him by Marshall more than a year before the commission of the alleged assault. This testimony shows conclusively that the evidence of Marshall was immaterial.

The evidence respecting the revengeful disposition of Solomon is incompetent in this action. In some cases of homicide, when "there is no direct testimony as to what was done, but the whole or the principal evidence is circumstantial," similar evidence is admitted in the courts of a number of the States. 2 Bish. Cr. Pr., §§ 614, 615. But in other States a different rule prevails. In *Commonwealth v. Hilliard*, 2 Gray, 294, the court decides that evidence that the deceased was a quarrelsome, fighting, vindictive and brutal man of great strength, is too remote and uncertain to have any legitimate bearing on the question at issue. The appellant is not placed within the principle stated in the authorities. The appellant and the injured party, Solomon, are upon the same footing; they are competent witnesses and testified to the facts of the alleged offense; their evidence is direct and not circumstantial, and the jury heard their testimony and were the judges of its credibility. If the foregoing evidence had been offered at the trial, the court would have overruled it as improper and therefore refused to postpone the trial to obtain the same.

The court did not abuse its discretion in refusing to continue the cause to enable the appellant to procure the witnesses to impeach the reputation of Solomon for truth and veracity. The record shows that the testimony of Solomon is corroborated by that of the appellant and the other witnesses. If we disregard the testimony of Solomon, the verdict cannot be disturbed because it is supported by all the evidence.

The appellant claims that the verdict is fatally defective, and that the degree of the crime of which the appellant has been convicted should be designated by the jury. The following verdict was returned: "We the jury find the defendant guilty as charged in the indictment, leaving the punishment to be fixed by the court." The indictment is based upon the 56th section of the act concerning crimes and punishments, providing that "an assault

with intent to commit murder * * * shall subject the offender," etc. The appellant relies upon the case of *The Territory v. Stears*, ante, 324, and other authorities upholding the doctrine stated therein. They are applicable to trials for the crime of murder. Our statute requires the jury to designate in the verdict the degree of murder of which the defendant is found guilty, and fixes different punishments for the offenses of murder in the first degree and murder in the second degree. Crim. Laws, §§ 21, 22, 23, 24, 25 and 102. The crime of an assault with intent to commit murder is not divided into degrees and the jury is not compelled to designate any degree in the verdict. The indictment states correctly the facts constituting the offense, and a person who commits the acts described therein, is guilty of the statutory crime of an assault with intent to commit murder. "A general verdict of guilty convicts the prisoner of all matters which are well charged against him in the indictment." 2 Bish. Cr. Pr., § 627. In an indictment for the crime of murder in States, in which the offense is not divided into degrees, and under which a party may be convicted of manslaughter, a verdict in these words is sufficient: "We, the jury, find the defendant guilty." Judgment can be entered upon this verdict and the defendant may be punished for the crime of murder. *People v. March*, 6 Cal. 543; *Smith v. People*, 1 Col. 121. There is no error in the form of the verdict in the case at bar.

The appellant criticises some of the instructions, but does not cite an authority pointing out any error of law. We think that the instructions as a whole are correct, and that the appellant has been convicted according to law and the evidence.

Judgment affirmed.

PERKINS, appellant, v. DAVIS, respondent.

PRACTICE — *demurrer — answer over.* When a party amends his pleading on a judgment sustaining a demurrer thereto, he waives his right to call in question the action of the court in sustaining the demurrer.

INSTRUCTIONS TO JURY. It was not error for the court below to refuse to give the instruction requested by plaintiff in this case. It was much too general and required a verdict for services, that, as appears from pleadings, were to be paid from trust property, and for all that appears were so paid.

Appeal from First District, Gallatin County.

SHOBER & LOWRY, for appellant.

S. WORD, for respondent.

WADE, C. J. This is an action to recover for services alleged to have been rendered by plaintiff as trustee and agent of defendant. There was a demurrer to the first three subdivisions of the complaint, which was sustained. Thereupon the plaintiff filed an amended complaint, to which there was an answer and replication thereto, and then a trial ensued upon the pleadings thus formed.

One of the principal errors complained of by the plaintiff is the action of the court in sustaining the demurrer to the original complaint. The record conclusively shows that the plaintiff elected to amend his complaint, instead of standing upon his demurrer, and he thereby waived his right to insist upon, or to call in question the action of the court in sustaining the demurrer.

In the case of *Gale v. Tuolumne Water Co.*, 14 Cal. 28, the court say: "They (the plaintiffs) now complain of the error of the court in sustaining the demurrer. But this they cannot do. They chose to amend. They went to trial upon the pleadings thus amended. If they desired to test the question as to the correctness of the judgment sustaining the demurrer, they should have left the pleadings where the judgment left them. They could not take all the advantage of the pleadings as they made them, and also the advantages of the rulings of the court before their amendment."

The authorities cited by the respondent, as well as the reason

of the rule, are conclusive upon the subject. Many other authorities might be cited to the same effect.

Another error assigned is the refusal of the court to give in charge to the jury an instruction asked for by the plaintiff. One portion of the instruction is as follows: "If from the testimony, you believe that the plaintiff rendered services for the defendant, as averred in plaintiff's complaint, and that the defendant has not paid the plaintiff therefor, then it is your duty to find for the plaintiff in the amount found due defendant to plaintiff under the testimony."

To understand the force and applicability of this instruction, it is necessary to present the issue in the case. The plaintiff sued for services rendered defendant as *trustee*. The defendant answered, and said, that such services were rendered for himself and one W. A. Fredericks, jointly, under an agreement that the trustee should receive his pay from the property he held in trust, and that in an action between Joseph Wilson as plaintiff, and W. A. Fredricks and this plaintiff and defendant, as defendants, the rights and claims of this plaintiff as such trustee were fully adjudicated and settled, and this defendant wholly relieved from any liability therefor. It will therefore be seen that the instruction asked for by the plaintiff would have authorized, if it did not direct, the jury to find a verdict against the defendant for the services rendered, notwithstanding the fact that the averments of the answer were all true, and that the plaintiff had been fully paid for his services by Fredericks, from the trustee property, or by the adjudication aforesaid. Even if the proof had shown all this, yet the instructions would have authorized the jury to have found that though the demand had been fully paid it had not been paid by defendant, and therefore he was liable.

The instruction was not applicable to the case, and the giving of it would have been error. We have carefully examined the instructions to the jury, as given by the court. They fairly present the case, and we see no reason for disturbing the judgment.

Judgment affirmed, with costs.

TAYLOR, appellant, v. HOLTER, respondent.

STATUTORY CONSTRUCTION — *new trial* — *statement of errors*. The amendments of the Civil Practice Act, approved February 13, 1874, require the party intending to move for a new trial to give "the points in writing, particularly specifying the grounds of such motion." *Held*, that the decisions of this court, holding that this party must specify the particulars in which the evidence is insufficient to justify the findings or judgment, and point out wherein the same are against law, have not been affected by these amendments. *Held*, also, that these amendments repealed the sections of the Civil Practice Act which required the preparation and settlement of a statement before the motion for a new trial could be heard.

FORM AND REVIEW OF EXCEPTIONS. Said amendments will not allow this court to consider exceptions which have not been reduced to form and signed during the term, or noted by the clerk, unless counsel consent, or the judge orders that they be prepared in vacation.

Appeal from Third District, Lewis and Clarke County.

THIS action was tried by WADE, J., without a jury.

CHUMASERO & CHADWICK and TOOLE & TOOLE, for appellant.

W. F. SANDERS and SHOBER & LOWRY, for respondent.

BLAKE, J. This is an action brought by the appellants to reform a deed made by the respondents. The cause was tried by the court without a jury; findings of facts were filed, and a judgment was entered for the respondents. The appellants filed a motion for a new trial "upon the following grounds, to wit: 1st. That the evidence is insufficient to justify the findings and judgment of the court. 2d. That the findings and judgment are against law. 3d. Errors in law occurring at the trial and excepted to by the plaintiffs." The motion was refused, and this ruling is before us for review.

We have held, in the cases decided under sections 234 and 235 of the Civil Practice Act, approved January 12, 1872, that the assignment of errors in the first and second grounds of the motion is too general and indefinite. They do not specify the particulars in which the evidence fails to support the findings and judgment,

or point out wherein the same are against law. *Mason v. Germaine*, 1 Mon. 263; *Pinney v. Hershfield*, id. 367; *Griswold v. Boley*, id. 545; *Thorp v. Freed*, id. 651.

These sections were amended by an act approved February 13, 1874, and it is necessary for us to inquire into its effect upon the principle announced in these cases. The party moving for a new trial, for certain causes, was required to prepare a statement. The statement specified the "particulars" in which the evidence was alleged to be insufficient, and the "particular errors" in law occurring at the trial. "If no such specifications be made, the statement shall be disregarded." The amended act repealed the clauses relating to the preparation of the statement, and provided that the party intending to move for a new trial "shall give, by himself or his counsel, the points in writing, particularly specifying the grounds of such motion, and shall furnish the judge with a copy of the same." Sts. 8th Sess. 52, §§ 13, 14. The grounds of this motion are stated in the words of section 233 of the Civil Practice Act, which defines the causes for which a new trial may be granted. If this practice is correct, the phrase in the amended statute, "particularly specifying the grounds of such motion," must be construed to have no meaning. This interpretation would defeat the true intent of the legislative assembly in making the amendments. We must give effect to this provision in order that the meaning of the law-makers may be fully carried out. Cod. Sts. 390, § 3. What wrong did they try to redress? Under the old statute great labor and vexatious delay were often caused, by the preparation and settlement of the statement, before the motion for a new trial could be heard. The amendments enable parties to obtain a speedy determination of this motion without the statement. The mode of proceeding in other respects is the same in substance. The doctrine of the cases decided under the original act has been recognized by the use of the foregoing clause in the amendment, and is applicable to the motion before us. The court below does not have the opportunity to correct errors, if they are not designated with certainty, and a notice of them in general terms does not inform the adverse party of the actual grounds of the motion. The first and second grounds of

the motion under consideration are not specified "particularly" and must be disregarded.

The third ground of the motion refers to errors in law. The transcript shows that no bill of exceptions was reduced to form and signed during the term in which the action was tried, or noted by the clerk of the court. There was no consent of counsel, or order of the judge, that any such bill be prepared in vacation and signed *nunc pro tunc*. The appellants have not complied with the statute, and there is no bill of exceptions for our examination. Sts. 8th Sess. 53, §§ 15, 16.

The pleadings support the judgment that has been entered, and the motion for a new trial has been properly overruled.

Judgment affirmed.

TERRITORY, appellant, v. YE WAN, respondent.

COMMON-LAW OFFENSES—*in force*. Section 185 of the Criminal Laws of Montana provides that all offenses recognized by the common law as crimes, and not herein enumerated, shall be punishable, etc., and classifies such crimes as felony or misdemeanor. Section 6 of our Criminal Practice Act confers jurisdiction of such offenses upon district courts, and section 5 of same act provides that prosecution in such cases shall be by indictment. This statute is in force and should be given its full effect.

NUISANCE—*interpretation*—*offenses*. The term *offenses*, as used in this statute, applies to certain acts and intentions, or acts and criminal negligence, and all such acts or omissions, as would constitute nuisance at common law, and are not enumerated in our statute, in section 147 of Criminal Law, are still indictable under section 185 of the same law. It is the act that constitutes the offense and that is punishable, and it matters nothing what name is attached to it.

REPEAL—*implication*. As to acts specified in said section 147, there can be no common-law nuisance, the statute having taken its place; but all other acts that constituted nuisance at common law, do so still under section 185. The common law is only so far repealed by implication, as the statute directly excludes it.

Appeal from Third District, Lewis and Clarke County.

J. K. TOOLE, District Attorney, Third District, for appellant.

CHUMASERO & CHADWICK, for respondent.

KNOWLES, J. The defendants were indicted for a common-law nuisance. They demurred to the indictment on the ground that it did not state facts sufficient to constitute a cause of action. The court below sustained the demurrer, and the Territory excepted to this ruling and appeals to this court, alleging such ruling for error. It is claimed by the respondents that there is no such thing as a common-law nuisance in this Territory; that in the 147th section of our criminal laws certain acts are declared to be a nuisance, and that no other acts are a nuisance even though classed as such at common law. As to the acts specified in said section 147, there can be no common-law nuisance. As to these acts, the statute takes the place of the common law and supplants it. But only so far as a statute takes the place of the common law, is the latter repealed by implication. A part of the 185th section of our criminal laws is as follows: "All offenses recognized by the common law as crimes, and not here enumerated, shall be punished," etc. The section provides what punishment shall be suffered for a felony and misdemeanor.

The statute was intended to meet such cases as the one now before us. It was supposed that there might be offenses constituting crimes at common law, and the prevention of which was necessary for the protection of the lives, property, health and happiness of the residents of this Territory, which might have escaped the attention of the legislative assembly. The term "offenses," as used in this statute, does not refer specially to the name of crimes. It more properly refers to the acts and intentions, or acts and criminal negligence that make up a crime. The object of criminal laws is to protect society from certain criminal acts or conduct. The phrase "offenses not here enumerated," refers to the acts and conduct which criminal laws declare to be crimes, and not to the term itself "crimes."

"When we understand that a particular thing is indictable, it is not always quite certain whether it is to be called a nuisance or not. Neither is it ever of any legal consequence to know the name of a common-law misdemeanor. The name does not appear in the indictment, and it need not in the proofs; and when we have

ascertained that the offense is not a felony, no further inquiry as to its name is of practical importance." Bishop on Statutory Crimes, 559. "Offense" is "the doing that which a penal law forbids to be done, or omitting to do what it commands." Bouv. L. Dict.

There are many acts made crimes by our criminal law, to which no name is given. Some of these were crimes at common law. Because they have no name given them, can it be said that they are offenses not enumerated in our statutes? Considering the term "*offense*" as referring to the acts and intentions, or acts and criminal negligence that make a crime, then there can be no doubt as to the effect of said section 185. Let it read thus: "All acts which, coupled with criminal intent," or, "all acts which, coupled with criminal negligence, were recognized by the common law as crimes and not herein enumerated," etc., and there would be no mistaking its meaning.

And this is, as I hold, the effect of the terms used. This section makes all common-law crimes, not set forth specifically in our criminal laws, offenses against the Territory, and provides for their punishment. This statute, I think, will be found to be a salutary one. It completes our Criminal Code. The above interpretation of section 185 is consistent with a reasonable intention on the part of the legislative assembly, and corrects a mischief that might be the source of considerable trouble if not thus anticipated.

If these views are correct, there can be a prosecution for any common-law nuisance not enumerated in section 147 of our criminal laws, as well as for the nuisances therein specified in this Territory. Section 6 of our Criminal Practice Act confers jurisdiction upon the district court of all common-law offenses; and section 5 of said Practice Act provides that all prosecutions in the district court shall be by indictment. The offense set forth in this indictment, it is conceded, was a common-law nuisance. The prosecution of the same in the district court was proper, and the court committed an error in sustaining the demurrer.

Judgment reversed.

BLAKE, J., concurred.

WADE, C. J., dissenting. I respectfully dissent from the doctrine that there can be any common-law offenses in this Territory in that class of cases where the legislature in the statute has particularly defined what shall constitute crime. A statute is impliedly repealed by a subsequent one revising the whole subject-matter of the first, and if a statute revises the common law, the implication is equally strong. Our statute has defined what shall constitute the crime of burglary, arson, robbery, etc., and is it possible that behind the statute there is another system of crimes in full force and effect, making other and different acts a like offense? I think not. And so in the case of a nuisance, our statute on the subject is a general one. It attempts to cover the whole ground, as does the statute in relation to murder, larceny, etc. And the fact that a statute has been enacted, ought to exclude the possibility of the common law being in force on the same subject. Our statute has defined what shall constitute larceny and the punishment thereof. The common law does the same, and provides that for larcenies above the value of twelve pence, the offender shall be denied the benefit of clergy, provided the crime was committed in a church; but if for a less amount, the offender shall have clergy. Our statute does not cover this exact ground, and for that reason, according to the argument, this portion of the common law is in force here, and offenders against it can be punished. An hundred instances of the same kind might be given, and the whole reason of the matter conclusively demonstrated, to my mind, that in those cases where the statute has attempted to define crimes, the common law upon the same subject is not in force. If the statute had made no provision for nuisances, the common law in relation thereto would be in force; but the legislature having spoken on the subject, the common law ought to be silent. It was a work of folly to enact a Criminal Code, if the common-law system of crimes remains in force, and that it should so remain, seems clear to my mind, was not the intention of the legislature.

ROUSH, appellant, v. FORT, respondent.

SALE BY EXECUTION — *fraud of creditor*. The sale of real property under an execution, which has been issued in excess of the judgment through the fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of *bona fide* purchasers.

SAME — *mistake of creditor*. The judgment creditor acquires the title to the property of the debtor under a sale, by virtue of an execution, that has been issued through his mistake in excess of the judgment.

SAME — *purchase by fraudulent trustee*. A trustee, who receives the rents of the property which has been delivered to him by his debtor, and does not apply the same upon the judgments according to his agreement, and causes the property to be sold under an execution in excess of the judgment, after allowing the proper credits, and becomes the purchaser, is faithless in the performance of his trust, and the sale will be set aside upon the motion of the debtor.

Appeal from Third District, Lewis and Clarke County.

THE orders referred to in the opinion were made by WADE, J. The cause was referred to W. E. Cullen, Esq., who reported findings of facts, which were approved by the court.

W. F. SANDERS and CHUMASERO & CHADWICK, for appellants.

Appellants admit that the evidence cannot be reviewed, but claim that the sale should be set aside for fraud shown by the facts found by the referee. It is a well-settled principle that sales of real property must be conducted with scrupulous care. Sales will be set aside if the process of courts is used to oppress. *King v. Platt*, 37 N. Y. 155; *Lefevre v. Laraway*, 22 Barb. 173.

Fort violated his agreement to apply the rents to the judgments, and sold the property for a larger sum than was due, and became the purchaser of the greater part of the mortgaged property. The sale should therefore be set aside. 1 Van Santv. Eq. Pr. 560; *Brinkerhoff v. Brown*, 4 Johns. Ch. 676; *Tripp v. Cook*, 29 Wend. 143; *Breese v. Busby*, 13 How. Pr. 489 and cases cited.

When several tracts of land are embraced in the decree for the foreclosure of a mortgage, the sale should be made only of so much of the land as will satisfy the debt. If more is sold, the sale will be set aside. *Waldo v. Williams*, 2 Scam. 470; *Longwith v. Butler*, 3 Gilm. (Ill.) 32.

If mortgagee is in possession, or receives the rents, he must credit the proceeds according to the agreement, or the sale will be set aside. *McConnel v. Holobush*, 11 Ill. 61

If the sale is made for more than is due on the execution, the same will be nugatory. *Peck v. Tiffany*, 2 N. Y. 451. The amount demanded by the usurer above what was due may have prevented the appellants from paying off the judgment, and from redeeming. *Hunt v. Loucks*, 38 Cal. 380. The maxim *de minimis non curat lex* does not apply. Broom's Max. 100.

TOOLE & TOOLE, for respondents.

The purchasers at the sale had no notice of the agreement between Fort and Roush, and could not be affected by the latent equity complained of by appellants. Civ. Pr. Act, §§ 271, 272, 279.

Appellants should have enjoined the sale. They might tender the purchase-money to the purchaser, if the equities would warrant it, and have some standing in a court of equity. *Frost v. Coon*, 30 N. Y. 428; *Am. Ins. Co. v. Fisk*, 1 Paige, 90; *Jackson v. Willard*, 4 Johns. 41; *Livingston v. Byrne*, 11 id. 555; *Billington v. Forbes*, 10 Paige, 487.

If the case had been reversed the sale would not be set aside, although the judgment had been reduced one-half. *Wood v. Jackson*, 8 Wend. 9; *Blakely v. Calder*, 15 N. Y. 617; *Buckmaster v. Curlin*, 3 Seam. 104; *Holden v. Sackett*, 12 Abb. Pr. 473; *Alvord v. Beach*, 5 id. 451.

The court will not set aside a sale upon an original bill. It should have been by a summary application in the original suit. *Requa v. Rea*, 2 Paige, 339; *Nicholl v. Nicholl*, 8 id. 349; *Brown v. Frost*, 10 id. 243; *Collier v. Whipple*, 13 Wend. 224; *McCotter v. Jay*, 30 N. Y. 80; *Gould v. Mortimer*, 26 How. Pr. 167.

The sale will not be set aside as to third parties. The amounts paid by them are not set out in the pleadings, and their rights cannot be protected if the sale is set aside.

The sale cannot be set aside as to Fort, because it does not appear that the property would realize more on a second sale. No injustice has been done. The master finds that the property was

sold for \$107.76 more than was due. The court could only set aside the sale of the last parcel, under any circumstances. It is not shown that appellants have been injured by the sale. The appellants have their equity of redemption. The property was fairly sold and brought good prices, and there is due appellants \$107.76 from the proceeds of the sale of the last parcel.

BLAKE, J. The respondent Fort commenced an action against the appellants February 23, 1871, to foreclose a mortgage upon real property, and obtained a judgment March 16, 1871. On November 10, 1871, the premises were sold by the sheriff under an execution to the respondents Fort, Reese and Stoner, who purchased separate parcels, and received certificates of sale therefor. The appellants commenced this action April 23, 1872. The complaint alleged that the sale to the respondents was irregular and void, and prayed that the same be set aside, and that the possession of the property be restored to the appellants. The cause was referred to a master in chancery, who submitted his findings March 5, 1873. The court then ordered that the sale be confirmed, and that the respondents have the income of the property from the day of the sale. This appeal was taken from this order.

The respondent, Fort, and the appellants made a written agreement July 8, 1871 by which the property was not to be sold until after October 1, 1871. Fort was to have the possession and rents of the premises, and receive interest at the rate of two and one-half per cent per month from July 1, 1871, upon the judgment recovered by him and one judgment which he bought. The income of the property was to be applied at the end of every month upon the judgments and any other indebtedness held against the premises by Fort. Under this agreement Fort collected \$815. and paid \$159.79 for the redemption of the property from a tax sale, at which he was the purchaser, and \$84.05, the amount of the tax for 1871. No part of this sum was applied upon the judgments. There were due to Fort on the day of the sale upon the judgment, \$3,055.79, after allowing all the credits to which the appellants were entitled, including the interest agreed upon and the amounts paid on account of the taxes. Fort caused the premises

to be advertised and sold to satisfy the amount of the judgments, \$3,342.68. The sale appears to have been legal in other respects, and we must determine the effect of the irregularities which have been specified upon the rights of the parties.

An execution which is issued in excess of the judgment can be amended upon motion and is not void, but voidable. A mistake of this character committed by any officer or party interested in the writ does not entitle the appellants to the relief prayed for in their complaint. The executions are regular upon their face, and were issued upon two valid judgments rendered against the appellants. The respondents, Reese and Stoner, had no knowledge of the agreement between Fort and the appellants, and purchased their portions of the premises in good faith and for a valuable consideration. If the record shows that the court had jurisdiction to render the judgments against the appellants, and the executions were valid, the rights of Reese and Stoner cannot be impaired by any secret vice in the proceedings of Fort under the agreement. In *Reeve v. Kennedy*, 43 Cal. 650, Mr. Justice CROCKETT says: "The repose of titles, and indeed every consideration of public policy, demands that a purchaser at a judicial sale, without notice, under proceedings regular on their face, and by a court of competent jurisdiction, should be protected as against mere errors of the court, and against secret vices in the proceedings founded on fraud, accident or mistake, and which can only be made to appear by the proof of extrinsic facts not appearing on the face of the record." In *Hunt v. Loucks*, 38 Cal. 372, Mr. Justice SANDERSON reviews the authorities, and says: "We understand the settled rule to be that if the execution be merely erroneous, that is to say, voidable, a sale under it to a *bona fide* purchaser will be valid, although the execution be afterward set aside." * * * "An execution which is amendable is not void, and an execution which merely calls for too much money is amendable." *Blood v. Light*, 38 Cal. 649, and cases there cited. The appellants did not make any motion to amend the executions, and we are satisfied that the interests of the respondents, Reese and Stoner, as purchasers of the property in controversy, cannot be affected by this action. *Martin v. Parsons*, 49 Cal. 99, and cases there cited.

If the executions were issued in excess of the judgments

through a mistake upon the part of the respondent, Fort, the appellants cannot obtain the relief sought against him. But the legal relations of these parties were changed by the agreement which was entered into. This respondent then occupied the position of a trustee for the appellants, and was required to apply upon the judgments certain funds which came into his hands. He reaped all the advantages of the bargain upon his side, and received an exorbitant rate of interest, when the statute allowed him ten per cent per annum, and acquired the possession of the property before the same could be obtained by the aid of legal process. After Fort neglected to perform his trust, by applying upon the judgments the money which he had received for this purpose, he caused the executions to be issued for the sale of the property, and became a purchaser. Will a court of equity tolerate this conduct?

The law guards sedulously the rights of the debtor in the steps that are taken for the sale of his property, and will not sanction the slightest undue advantage over him. In *King v. Platt*, 37 N. Y. 160, the court says: "A court of equity justly scrutinizes the conduct of a party placed by the law in a position where he possesses the power to sacrifice the interests of another in a manner which may defy detection, and stands ready to afford relief on very slight evidences of unfair dealing, whether it is made necessary by moral turpitude, or only by a mistaken estimate of others' rights." A sale will be set aside when there has been fraudulent conduct in the purchaser. *Lefevre v. Laraway*, 22 Barb. 167, and cases there cited; *Breese v. Busby*, 13 How. Pr. 485. The holder of a mortgage does not stand upon the same footing of public policy with other buyers. *Tripp v. Cook*, 26 Wend. 158. "If one acting as trustee for others becomes himself interested in the purchase, the *cestuis que trust* are entitled, of course, to have the sale set aside." *Stephen v. Beall*, 22 Wall. 340, and cases there cited. The respondent, Fort, misapplied the funds intrusted to him, endangered the interests of the appellants, and showed a want of reasonable fidelity to his trust. 1 Story's Eq. Jur., § 239; 2 id., § 1289. He was faithless in the performance of his fiduciary duty, and the foregoing authorities declare the conse-

quences of his misconduct. We cannot allow a party to take advantage of his own wrong, and must set aside the sale of the property to Fort.

Cause remanded for further proceedings.

UNITED STATES, respondent, v. SMITH, appellant.

CRIMINAL PRACTICE — *appeal* — *United States cases*. No appeal lies in criminal cases from an order overruling a motion for a new trial, but only from a judgment. A motion for a new trial must be made before judgment, and if denied the remedy will be by appeal from the judgment. *Quere*, whether the Criminal Practice Act of the Territory applies to cases arising under the United States laws. Appeals are not allowed in criminal cases in the United States courts.

Appeal from Third District, Choteau County.

THE defendant was tried and convicted in the third district under the United States laws, of the offense of selling whisky to Indians, but broke jail before sentence.

SHOBER & LOWRY, for appellant.

M. C. PAGE, United States Attorney, for respondent.

KNOWLES, J. The notice of appeal in this case is in the following language: "You are hereby notified that the defendant in the above-entitled cause appeals to the supreme court of Montana Territory, from the judgment and order of said district court, made on the 18th day of May, A. D. 1875, overruling defendant's motion for new trial, and from the whole thereof." In referring to the judgment and order, as it is termed, above specified, I find it simply an order overruling a motion for a new trial. The term "judgment" does not properly apply to it.

In referring to the Criminal Practice Act, upon the subject of appeals, I find section 393 to be as follows: "An appeal to th

supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and upon appeal, any decision of the court or intermediate order, made in the progress of the case, may be reviewed." It will be seen, in this statute, that the defendant under our practice, in criminal cases, can only appeal from a judgment. There is only one judgment in a criminal case. Under the provisions of our Criminal Practice Act, a motion for a new trial cannot, as in civil cases, be made after final judgment. It must be made before. See Codified Statutes, p. 243, § 354: "The application for a new trial must be made before judgment." The order overruling a motion for a new trial can be reviewed on an appeal from the judgment, and in no other way. There is nothing to show in the record that any judgment was ever entered in this case. The appeal being from an order overruling a motion for a new trial should be dismissed. It is not an order from which an appeal lies in criminal cases.

I have considered this case as though the Territorial criminal practice prevails, in appealing criminal cases arising under the United States laws, from the district to the supreme court. The appeal in this case was evidently attempted to be taken, in accordance with our Territorial criminal practice. But this practice, I have shown, does not allow this appeal. Nor would the practice that prevails in regard to appeals in the Federal courts warrant this appeal. In these courts there are no appeals in criminal cases. There appeals pertain to equity cases only, and appeals are from final decrees. Law cases are reversed in those courts by writ of error only, and a writ of error lies only from final judgments in civil cases, and no writ of error lies from a judgment in criminal cases.

The appeal must be dismissed and it is so ordered.

Appeal dismissed.

HALL, respondent, v. ASHBY, appellant.

TRUSTEE OF TOWN SITE — *authority* — *estoppel* — *dedication of alley*. The town site of Helena was surveyed, and the plat was accepted and filed by the proper officers January 7, 1869. H. claimed that certain land is a public alley, which is so described in the deed to him by the trustee of the town site, but is not so designated upon the plat. A. applied for and received a deed to the land from the trustee. The trustee and other officers derived their authority from the laws of the United States and Territory relating to the reservation and sale of town sites. *Held*, that the trustee has no judicial power, and cannot dedicate any part of the town site as an alley. *Held*, also, that the trustee is not estopped from executing a deed to the claimant of a lot, which has been described improperly as an alley by his predecessor in the office. *Held*, also, that parties who receive deeds from the trustee are required to ascertain his authority, and acquire no right to the use of a part of the town site which has been described illegally as an alley.

NEW TRIAL — *effect of public interests*. This is an action between private persons, which affects the right of the public to use certain land as an alley. and the court filed findings of the facts. *Held*, that this court will not order any judgment to be entered upon the findings, and, therefore, grants a new trial.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J.

W. F. SANDERS, for appellant.

Can a probate judge create an alley, except in the manner provided by the statute? Cod. Sts. 548, § 4; *Parsel v. Barnes*, 25 Ark. 261; *Gulick v. Grover*, 33 N. J. L. (4 Vr.) 463; *Green v. Benson*, 31 Ind. 7.

Duties to be performed for a municipality by law must be strictly followed. If exceeded, they are not binding on the principal, and are void. Dill. on Corp., §§ 372, 749.

The equities, which obtain as to private agents, do not exist as to the officers of municipal corporations. Greenl. on Ultra Vires. 6, 379, 385, 396, 58, 59; Dill. on Corp., §§ 149, 381, 749, 766; *Mayor v. Ray*, 19 Wall. 468; *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

A deed from a probate judge falsely describing land as bounded on an alley, is not an estoppel as against a statute subjecting such

alley to private entry and ownership. This is not a case where liabilities of contract can arise. Rev. Sts., U. S., §§ 2337, 2387.

The deeds, bounding land in Helena by an alley, do not carry the title to the grantee to the center of the highway. The other rule is based on the presumption that the road came originally from the private owners on each side equally, and the public right was only an easement on the private right. Bacon's Abr., "Highways;" *Dunham v. Williams*, 37 N. Y. 251.

The powers vested in the probate judge are new rights, and the method of their vindication must be that prescribed by the statute. The district court does not have jurisdiction of this case. Dill. on Corp. 784; Cod. Sts. 549, § 12; *Chicago v. Evans*, 24 Ill. 52; *Wetmore v. Story*, 22 Barb. 429; *Lee v. Sandy Hill*, 40 N. Y. 443.

CHUMASERO & CHADWICK and TOOLE & TOOLE, for respondents.

The power of the probate judge to lay out an alley does not affect this case. Appellant admits his authority to convey the ground in dispute and took a second deed for it.

If there is no legal alley, appellant cannot claim it. The fee is in the respondents by the calls in their deeds. If respondents designated the ground as an alley their deeds conveyed the title, and the deed to appellant carried nothing. 1 Bouv. L. D. 586; 3 Wash. on Real Prop. 360; 3 Kent, 349; *Kittle v. Pfeiffer*, 22 Cal. 489; *Parker v. Smith*, 17 Mass. 415; *Parker v. Framingham*, 8 Metc. 267; *O'Linda v. Lothrop*, 21 Pick. 292; *Newhall v. Iveson*, 8 Cush. 595; *Barrows v. Mass. M. Society*, 12 Gray, 409.

BLAKE, J. This is an action to compel the appellant to remove a fence from an alley or *cul de sac* within the town site of Helena, Lewis and Clarke county, and enjoin him from obstructing the premises. The court tried the cause without a jury and filed findings of facts upon some of the issues and granted the respondents the relief prayed for.

Under the acts of congress relating to the reservation and sale of town sites on the public lands, certain officers are empowered to enter at the land office a tract which has been settled upon

and occupied as a town site, and is not subject to entry under the agricultural pre-emption laws. Helena has not been incorporated and has no corporate authorities and this duty devolved upon the probate judge of Lewis and Clarke county. The town site was surveyed and the plat was submitted to and accepted by the county commissioners January 7, 1869, and filed in the office of the county recorder. The plat shows the blocks, lots, streets and alleys of the town site. The ground in controversy is not designated upon the plat as a street or alley, and is situated between the lot of the appellant on Rodney street and the lots of the respondents on Broadway street.

The respondent Hall derives his title from a deed of the probate judge, made October 6, 1869. The title of the respondent Parchen, is based upon a deed made by the probate judge, October 9, 1869, to L. L. Hill, and the deed of Hill to him June 10, 1872. The appellant claims the title to his lot through a deed from the probate judge to T. L. Gorham, dated July 12, 1869, the deed of Gorham to H. T. Fort made September 21, 1869, and the deed made to him by Fort, November 18, 1871. In the conveyances to the respondents and their grantors, their lots are described and bounded "southerly by alley." In the conveyances to the appellant and his grantors, his lot is described and bounded "northerly by an alley." On December 1, 1871, the appellant filed his application with the probate judge for a deed to the land in dispute and received a deed for the same, March 13, 1874. The appellant entered and took possession of the premises May 1, 1872, and built the fence complained of. The muniments of the title of all the parties were received as evidence without objection.

The first question which must be investigated is the power of the probate judge to make the deeds which have been mentioned.

The statutes of the United States provide that the execution of the trust vested in the probate judge in the disposal of the lots and the proceeds of the sale thereof, shall be conducted according to the regulations prescribed by the legislative assembly of the Territory; and that any act of the trustee which is not in conformity to these regulations shall be void. 14 U. S. Sts. 541, 542. The laws of the Territory require the survey and plat to "conform as

near as may be to the existing rights, interest and claims of the occupants" of the town-site; that the town-site "shall be surveyed into blocks, lots, streets and alleys," and that "the streets and alleys designated in such plat shall remain dedicated to public use forever." Cod. Sts. 547, §§ 3, 4. The probate judge must make good and sufficient deeds of the lots to the claimants. Cod. Sts. 549, § 9.

Does the probate judge have the authority to establish and lay out an alley or street after the plat has been accepted and filed according to law? Is this officer estopped from executing to the appellant a deed of the land claimed as an alley, after making the deeds to the appellant and respondents and their grantors, in which the lots are described and bounded on one side by the alley in controversy?

The probate judge acts as a trustee under the laws which have been cited, and has no authority except that which has been conferred upon him in express terms. This court has held that this officer must comply strictly with the requirements of the statute, and that nothing respecting his action will be presumed. *Ming v. Truett*, 1 Mon. 322; *Edwards v. Tracy*, ante, 49. He performs a ministerial act in awarding deeds to the claimants of lots and exercises no judicial functions. In *Denver v. Kent*, 1 Colorado, 336, the court decides that the trustee of the town-site cannot sell any portion of the trust property until the legislature enacts the regulations defining his conduct, and says: "These rules and regulations were imperative upon him. They were the charter of his power and could not be disregarded. What they authorized he could do, and beyond them he could take no step." The supreme court of Nevada maintains the doctrine announced in *Edwards v. Tracy*, supra, and holds that the deed obtained from the trustee of the town-site is not conclusive. *Treadway v. Wilder*, 9 Nev. 67; S. C., 8 id. 91. The supreme court of California decides under similar statutes that the trustees have no power to change the plan of the town in such a manner as to convert into a street, alley or public square, land which under the prior plan was a municipal subdivision, intended for private use, and actually occupied for that purpose. *Aleman v. Petaluma*, 38 Cal. 553.

We are satisfied by these authorities that the trustee of the town-site of Helena held all the public land within its exterior limits which had not been occupied, and to which there were no possessory rights, for the benefit of the inhabitants, as a community. The probate judge had no power to dedicate any portion of this tract as an alley for the use of any persons. "A primary condition of every valid dedication is that it shall be made by the owner of the fee." Angell on Highways, § 134; 1 Dillon's Mun. Corp., § 498; *Bangan v. Mann*, 59 Ill. 492. The United States has parted with its title, and the inhabitants collectively are the legal owners of the vacant unclaimed lots within the town-site of Helena. The probate judge of Lewis and Clarke county, who made the deeds relied upon by the respondents, did not own the fee. It is evident that the owners of the fee did not lay out the ground in controversy as an alley, or dedicate the same to public uses, and the action of their trustee in attempting to establish the alley by the description of the lots in the deeds is not compatible with the scope and nature of his trust. *Rex v. Leake*, 5 B. & Ad. 469.

The respondents did not acquire any right to the use of the premises as an alley by reason of the boundaries of the lots described in the conveyances. The acts of the trustee of the town-site in this matter are void. The persons who received the deeds took them with a knowledge of the law that the probate judge cannot create an alley by exceeding his authority. Those who deal with the agent of a municipal corporation are bound to ascertain the nature and extent of his authority in all cases where his power is conferred by statute. *Mayor v. Ray*, 19 Wall. 468; 1 Dillon's Mun. Corp., § 372, and cases there cited. The trustee of the Helena town-site holds a position analogous to that of such an agent.

The probate judge was not estopped from making the deed of the ground in dispute to the appellant by the recitals in the conveyances to other persons that this tract was an alley. Where the grantor is acting officially as a public agent or trustee, the estoppel does not apply. 1 Greenl. Ev., § 24; Herman on Estoppel, § 235. In *Mayor v. Ray*, *supra*, the court decides that the acts of the officers of a municipal corporation, which are performed

without legal authority, "cannot create an estoppel against the city itself, its tax payers or people."

The court erred in rendering the judgment for the respondents. This action is between private parties, but the final decision may affect public rights. We do not think that it would be proper for us at this time to direct what judgment should be entered in the court below. Therefore, it is ordered that the judgment be reversed with costs and that the cause be remanded for a new trial of the issues therein.

Judgment reversed.

UNITED STATES, appellant, v. McELROY, respondent.

CASE OVERRULED. The case of *The United States v. McElroy*, ante, 237, deciding that an appeal from the district court, in a case arising under the laws of the United States and perfected according to the requirements of the Civil Practice Act, was irregular and unauthorized, is hereby overruled.

CONSTRUCTION OF ORGANIC ACT — *ninth section — appeals — in all cases — "same as in other cases" — different jurisdictions.* The ninth section of the Organic Act of the Territory allows appeals in *all* cases from the final decision of the district court to the supreme court, under such regulations as may be prescribed by law. Appeals being allowed in cases wherein the district court exercises the jurisdiction of the United States district and circuit courts, "the same as in other cases," this must, of necessity, refer to Territorial cases, and hence the Civil Practice Act applies to every class of cases that may arise under any jurisdiction the court can exercise.

EMBEZZLEMENT — *fiduciary capacity — conversion — direct averments.* To constitute the crime of embezzlement, the elements of the fiduciary relation and the conversion are essential, and each must be covered by direct averments and not left to implication, or the indictment will be demurrable.

THE original case is reported, ante, 237.

M. C. PAGE, United States District Attorney, for appellant.

SHARP & NAPTON, for respondent.

WADE, C. J. This cause is before us on motion for rehearing. The action is one arising under the laws of the United States.

and the appeal to this court was taken and perfected in pursuance of the Territorial practice under the Practice Act. In the decision rendered, *ante*, 237, it was held that the Territorial practice regulating appeals was inapplicable to the case, and that the appeal should have been taken, in pursuance of the laws of the United States regulating appeals, from the circuit courts to the supreme court. The decision does not seem to have been well considered, and the reasons for it are unsatisfactory. We have therefore had the case again under advisement.

The Organic Act of the Territory, after declaring that the supreme and district courts respectively shall possess chancery and common-law jurisdiction, provides that "writs of error, bills of exceptions and appeals shall be allowed in all cases, from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law. Organic Act, § 9.

Under the authority herein granted, the legislature, in adopting the Code of Civil and Criminal Procedure, provided for and regulated the mode of taking appeals from the district to the supreme court. The same section of the Organic Act then provides: "And each of the said district courts shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States, as is vested in the district and circuit courts of the United States; * * * and writs of error and appeal in all such cases shall be made to the supreme court of said Territory, *the same as in other cases.*"

Difference of opinion has arisen as to the application of the phrase, "the same as in other cases." What other cases are referred to? The solution of this question will determine whether appeals from the district courts to the supreme court of the Territory, in causes arising under the constitution and laws of the United States, shall be taken, in pursuance of the Territorial practice, as established in the Practice Act, or whether such appeals shall be taken, in such cases only, and in the manner provided for appeals, from the circuit courts of the United States to the supreme court.

It will be seen that the section of the Organic Act provides first for appeals in *all* cases tried in the district court to the supreme court; and no construction should be put upon the

language of the section that defeats the right of appeal in any case or in any class of cases. The section then provides for appeals in cases arising under the laws of the Territory; then enlarges the jurisdiction of the Territorial district courts so as to authorize such courts to hear and determine all causes arising under the constitution and laws of the United States; and then provides that appeals in such cases shall be made to the supreme court of the Territory, "the same as in other cases." The only other cases in which the section attempts to direct in what manner appeals shall be taken are cases arising under the laws of the Territory, and it follows, therefore, that the phrase "other cases" refers to Territorial cases.

Having provided for appeals generally, and then directing that appeals in certain specified cases shall be taken the same as in other cases, the particular appeals authorized must fall within the provisions of the general rule.

It is evident that the phrase "other cases" does not refer to appeals from the circuit courts of the United States to the supreme court, for such appeals are only allowed in certain cases and never in criminal cases.

Having given the right of appeal absolutely and without exception, in all cases tried in the Territorial district courts, the term "other cases" cannot refer to appeals from the circuit courts of the United States, for no appeal can be taken in that court *in any criminal case*.

It has been decided that the supreme court of the United States possesses no appellate jurisdiction in any form in criminal cases, no such power having been confided to it by congress. *United States v. More*, 3 Cranch, 159; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Watkins*, 3 Peters, 193.

There is no statute of the United States giving a writ of error to revise the judgments of the district and circuit courts in criminal cases, and consequently no bill of exceptions can lawfully be allowed. It is only by means of a certificate of disagreement in opinion, upon a question of law between the judges of a circuit court, that a criminal case can be brought under the cognizance of the supreme court. Conkling's Treatise, 635; *Ex parte Gordon*, 1 Black, 503.

It follows, therefore, that if the Organic Act only intended to provide for such appeals from the Territorial district courts to the supreme court, in cases arising under the constitution and laws of the United States as are authorized and provided for from the circuit courts of the United States to the supreme court, then the right of appeal from the district courts of the Territory to the supreme court, in all criminal cases arising under the laws of the United States, is entirely cut off, and no such appeal can be had either by the United States or the defendant. The Organic Act does not admit of any such construction, and its proper interpretation is, that appeals in cases arising under the laws of the United States shall be taken in the same manner as appeals in cases arising under the laws of the Territory.

The appeal having been taken in pursuance of the laws of the Territory, the case was improperly dismissed, and the judgment of dismissal is set aside.

The indictment charges that the defendant, being a postmaster and an officer of the United States, charged with the safe-keeping, transfer and disbursement of public moneys, unlawfully and feloniously converted to his own use and embezzled a portion of the said public moneys intrusted to him for safe-keeping, transfer and disbursement, to wit, etc.

In order to constitute the crime of embezzlement, the property embezzled must have been received in the capacity of clerk, servant or agent of the owner and then converted.

In this indictment it does not appear save by implication in what capacity the defendant received the money. This is not sufficient. The charge should be direct. The demurrer was properly sustained.

Judgment affirmed.

HALE, respondent, v. PARK DITCH Co., appellant.

PRACTICE — settlement of statement on appeal. It is the duty of the judge who tried the cause to settle the statement on appeal when the parties disagree. In doing so, he must rely upon his own recollection of what the testimony was, and not allow a new trial out of court to ascertain what transpired in court.

RULE NO. 26 — application. Supreme Court Rule No. 26 does not apply to a case wherein the judge certifies according to his recollection of the testimony, but only in cases where the petition shows that he refused to certify as he remembers it.

Cause pending in Third District, Lewis and Clarke County.

THIS cause appears in this court upon a petition claimed to be authorized under Supreme Court Rule No. 26, to correct a statement on appeal, the defendant being dissatisfied with the settlement made by the judge who tried the case. The case was heard at the August term, 1875, but the opinion was not delivered till January term, 1876.

WADE, C. J. This is a petition, under rule 26 of this court, to cause the correction of a statement on appeal.

The rule, in substance, provides that if any justice of this court, while holding a district court, shall refuse to certify to a statement in accordance with the facts, upon proper showing to this court an order may be granted giving leave to the aggrieved person to prove the facts in relation to such statement. This rule was adopted in aid of section 371 of the Codified Statutes, which requires the judge of the district court to settle a true statement of the evidence on appeal.

Where a statement on appeal has been filed by one party, and amendments thereto by the opposite party, it is the duty of the judge who tried the case to settle and certify a true statement of the case upon appeal. Where there is a conflict between the parties as to the evidence and what the statement should contain, the judge must settle such conflict and certify to a true statement. In doing this, after having examined, if he deems proper, the testimony taken by both parties and his own notes taken at the trial, he must depend and rely upon his own recollection of what

the testimony was. And before a petition would be proper under or come within rule 26, it must be shown to this court that the judge refuses to certify to the statement as he remembers it. The bare fact that either party thinks his memory incorrect is not sufficient. The statement must depend absolutely upon the memory of the judge, and the case cannot be tried over again to ascertain if his memory is incorrect. To bring himself within the rule, the party must show by his petition that the judge refuses to certify to the statement as he remembers it. No such thing is claimed in this case; on the contrary, the judge did certify to the correctness of the statement as the law requires, and no one claims or pretends that he did not certify to it as he remembered it. But the defendant seemingly wishes, by this petition, to try the case over again, by having the witnesses come before this court and testify to what they said in the trial below. Of course this cannot be done where the judge has certified to the statement as correct, as he recollects the facts. The judge is to say what the witnesses testified to upon the trial, and not the witnesses themselves. The judge, charged with the duty of hearing and knowing what a witness says in his evidence, is more likely to remember what was said than the witness, especially after the lapse of considerable time, as in this case, and this court has no jurisdiction to settle a conflict between the memory of a witness and that of a judge. Neither is it proper for a party to procure affidavits from witnesses as to what they testified to, and present them to the court to influence his settlement of the statement. The statement must be settled by the judge from what transpired in court, and his memory upon the subject is absolute. He cannot resort to a second trial of the case out of court to ascertain what transpired in court.

For these reasons the petition is dismissed, and, even if we had authority to settle the conflict between the memory of the judge and that of the witness, we should say, looking upon the statement as settled and the amendments proposed in the petition, that there was no conflict to settle. The statement substantially contains all that the petitioner asked that it should.

Petition dismissed.

DANIELS, respondent, v. ANDES INSURANCE Co., appellant.

STATEMENT OF EVIDENCE — exceptions. This court will disregard a statement of the evidence on the motion for a new trial which has not been incorporated in a bill of exceptions.

REVERSAL OF JUDGMENT — law of case. The decision of this court in affirming the judgment of the court below on the first appeal of this action, *ante*, 78, became the law of the case in its subsequent stages.

AFFIDAVITS BY UNITED STATES COMMISSIONER. The statutes of the Territory do not authorize a commissioner of the United States to take affidavits which can be admitted as evidence by the courts upon the trial of an action.

TAKING OF EXCEPTIONS — waiver of statute. The appellant did not save properly any exceptions to the instructions of the court, but during the trial the attorneys stipulated that "the said exceptions may be had, used and made available on appeal as if so regularly and properly taken." *Held*, that this practice is improper, and the authority of attorneys to make this agreement is doubted.

Appeal from Third District, Lewis and Clarke County.

THE action was tried by WADE, J., with a jury, and a judgment for Daniels was entered on the verdict.

The respondent moved to strike from the transcript certain parts and papers.

CHUMASERO & CHADWICK, for the motion.

E. W. & J. K. TOOLE, contra.

KNOWLES, J. The respondent, by his motion, asks this court to strike from the transcript that part called a statement, and all portions thereof which do not properly constitute the judgment roll.

The part of this transcript entitled "motion and statement for a new trial," is nothing but a motion for a new trial. A statement under the statute, when applied to a motion for a new trial, refers to this evidence introduced on the trial. The evidence, which is made a part of the record, does not purport to have been used on the hearing of the motion for a new trial. By inference from the certificate of the judge attached to the motion for a new trial, it seems that this evidence was settled as a statement in the case for some purpose, which does not appear. The record does

not show that this statement of evidence was any part of a bill of exceptions in the case.

If it was used on the motion for a new trial, that would not make it a part of the bill of exceptions. Under our statutes it is contemplated that the statement of the evidence is properly a part of the bill of exceptions taken to the ruling of the court on the motion for a new trial, to be prepared and settled after the ruling upon said motion, and is not a part of the motion for a new trial. Sts. 8th Sess. 52, 53. This statute was adopted with the view of lessening the labors of attorneys in preparing motions for a new trial, and should be followed. This motion to strike from the transcript all parts of the same except the judgment roll embraces all the evidence set forth therein, and as this evidence does not purport to be any part of a bill of exceptions in the case, it must be sustained as to this. The striking out of the evidence makes other parts of the transcript, except the judgment roll, useless, and they must follow the evidence.

The motion is sustained.

The case was then heard on its merits.

E. W. & J. K. TOOLE, for appellant.

Respondent is bound by his warranties, and cannot deviate from them. The complaint does not set out the breaches on which the liability of appellant attaches, and is insufficient.

The affidavit of respondent and his clerk showed false swearing, and should have been admitted to the jury. False swearing, by the terms of the policy, avoided the policy. The affidavit showed that more gunpowder and coal oil were kept in respondent's store than the policy allowed. This evidence was material.

The court erred in modifying an instruction relating to the effect of a false description of the insured premises. Respondent cannot avoid his representations by claiming that insurer knew their falsity. *Bryce v. Lorillard Ins. Co.*, 55 N. Y. 240.

The record shows the loss was caused by the explosion of a coal oil lamp, used in violation of the policy.

CHUMASERO & CHADWICK, for respondent.

The instructions were not excepted to by any party, and were

according to the law, as claimed by appellant. There is nothing for this court to review. No bill of exceptions was properly saved. The testimony cannot be considered. The case of *Bryce v. Lorillard Ins. Co.*, *supra*, is inapplicable. The judgment should be affirmed, with damages for the delay.

BLAKE, J. This case has been before us upon another appeal, and some of the facts appear in the opinion of the court, *ante*, 78. The appellant has not performed the duty of perfecting the transcript according to the statutes and rules of this court, and we have been compelled to strike the evidence from the record.

The appellant relies upon four grounds to reverse the order of the court below in overruling the motion for a new trial. It is contended that the complaint does not set out the breaches of the policy on which the liability of the appellant attaches. This court decided on the first appeal that the complaint states facts sufficient to constitute a cause of action. That ruling became the law of the case in its subsequent stages, and will not be reviewed again. *Lick v. Diaz*, 44 Cal. 479; *Polack v. McGrath*, 38 id. 666; *Gates v. Salmon*, 46 id. 361; *Creighton v. Hershfield*, *ante*, 169.

The second ground is that the court refused to allow an affidavit of the respondent to be identified and offered as evidence for the purpose of contradicting the respondent. The so-called affidavit was subscribed and sworn to before "E. W. Carpenter, United States Commissioner." Under the laws of the Territory this officer had no authority to take the affidavit, and the court could not receive it as testimony. Civ. Pr. Act, § 473; Cod. Sts. 617, § 1. The bill of exceptions in which this affidavit is embraced is dated November 30, 1872, and the second trial of the action took place in November, 1874. The transcript does not contain any stipulation relating to this subject. The counsel for the appellant insists that the same exception was saved at both trials, and that by an agreement of the attorneys for the parties, this bill is to be used on this hearing. This statement is denied by the counsel for the respondent. We cannot be governed by the understandings of attorneys which have not been reduced to writing. *Orr v. Harding*, 1 Mon. 387. The transcript shows that the exception was not taken at the proper time, and we cannot consider it.

The third ground is that the court erred in modifying certain instructions, and refusing to read other instructions which the appellant requested the court to give. No exceptions to the instructions have been saved properly, but the parties entered into an agreement which forms a part of the record, and waived all the requirements of the statute regulating the taking of the same. It is stipulated that "the said exceptions may be had, used and made available on appeal as if so regularly and properly taken." This action of the attorneys must be censured as irregular, and we question their power to substitute their contract for the laws of the Territory. No agreement of parties can confer upon this court a jurisdiction which is not given by the statutes. *Wilson v. Davis*, 1 Mon. 98. Let us assume that we have the authority to examine the alleged error. The appellant calls our attention to one case only — *Bryce v. Lorillard Ins Co.*, 55 N. Y. 240. It appears that the party insured goods in a section of a warehouse, which was described in the application and policy as letter C, Patterson stores, etc. The property was in the section known as letter A of the building, and the court held that the error in the description was fatal to the person claiming the benefit of the policy. We have not been able to find any instruction which is in conflict with this ruling. The court complied with the numerous requests of the appellant, and gave many instructions to the jury, which are favorable to the appellant. The case was presented fairly, and the appellant has failed to point out any error in law.

The last point submitted by the appellant is, that the loss of the property by fire was caused by the act of the respondent in violating the conditions of the policy. The testimony is not before us, and cannot be examined for the purpose of determining this question of fact.

Judgment affirmed.

STEPHENS, appellant, v. HARTLEY, respondent.

JURISDICTION. Residence or service of summons is not necessary to confer jurisdiction over the person of defendant, where there is a voluntary appearance and answer. The district courts of the Territory are courts of general jurisdiction, and unless the contrary affirmatively appears, jurisdiction will be presumed, and appearance and answer waive all objections on the score of non-residence or non-service of summons.

PRACTICE — *pledge* — *settlement* — *demand*. An action for money had and received will not lie by a pledgor against a pledgee, with power to sell until after settlement, and a demand of payment for balance found due. Where dispute arises as to the amount applicable for interest out of the avails of pledged securities, an action for accounting is the proper remedy.

Appeal from Second District, Missoula County.

A. E. MAYHEW and JOHNSTON & TOOLE, for appellant.

SHARP & NAPTON, for respondent.

WADE, C. J. This is an action for money had and received. The pleadings and proofs exhibit this state of facts: The plaintiff, October 21st, 1869, executed and delivered to the defendant his promissory note for \$1,250, payable August 1st, 1870, and at the same time delivered to the defendant certain county warrants and money orders, as collateral security to the note, which, by an agreement between the parties, the defendant was to collect, as they became due, and apply the proceeds upon the note, which was done.

The plaintiff, claiming that more money was so applied than lawfully became due upon the note, brings this action to recover back what was so misapplied.

The defendant is a non-resident, and no personal service was had upon him. No writ of attachment was issued in the case, by which any property of defendant was reached. No demand was made by plaintiff before commencing the action. The defendant appeared and answered the complaint and a trial was had.

The defendant, upon these facts, insists: First. That no judgment *in personam* or *in rem* can be rendered against him, because he is a non-resident, and was not served with summons; and no prop-

erty was attached by which the court acquired jurisdiction. Second. That plaintiff should have made demand before beginning the action.

1. Our statute does not require, as a jurisdictional fact, which shall be established before the court can act, that the defendant shall reside in the county or Territory where the court is held. If he is a non-resident he cannot be brought into court by compulsion, but if he voluntarily appears and answers, he subjects himself to the jurisdiction of the court, and by such answer waives the issuance of a summons and personal service.

The case of *Burckle v. Eckhart*, 3 N. Y. 137, shows that the residence of the defendant within the county is a necessary fact to be proved, before the court acquires jurisdiction. The court says: "The residence of a defendant within the limits of a circuit, according to the third subdivision of second section of the statute above quoted, is a jurisdictional fact which must exist before the court can act at all, either by issuing process or accepting the appearance of the defendant. It is necessary to give jurisdiction of the cause not of the person. In such a case there can be no waiver." By that statute the residence of the defendant within the circuit was a necessary fact to be established before the court had jurisdiction over the defendant. Our statute has no such limitation, and the district court is a court of general jurisdiction. It follows, that if a defendant voluntarily places himself within the county where the court is organized, or voluntarily appears in court and answers as a party to an action, the jurisdiction of the court attaches to him the same as to a resident defendant. He waives the service of summons by his voluntary appearance, and subjects himself to the jurisdiction of the court.

In *Davis v. Packard*, 6 Wend. 331, the rule is correctly stated and the chancellor says: "As a general rule, if the jurisdiction of the court is limited to particular classes of persons, or to a particular subject-matter, or to the subject of the suit, or to the parties only under special circumstances, it must appear by the record of its proceedings, affirmatively, that such jurisdiction did exist, or its judgment or decree, if not absolutely void, will be subject to reversal by the superior appellate court. But if the jurisdiction of the court is general or unlimited, both as to parties and subject-

matter, it will be presumed to have had jurisdiction of the cause, unless it appears affirmatively from the record, or by the showing of the party denying the jurisdiction of the court, that some special circumstances existed to oust the court of its jurisdiction in that particular case. In the first class of cases where the court has jurisdiction over the subject-matter of the suit, and facts are stated in the proceedings sufficient to give it jurisdiction as to the parties, if the defendant appears and confesses those facts or tacitly admits them by pleading to the merits, he is precluded and cannot afterward assign for error the want of jurisdiction. Thus, by the constitution and laws of the United States, the Federal courts have no jurisdiction over ordinary suits between citizens of the same State; yet, if it be averred in the declaration that the plaintiff is a citizen of a different State from the defendant, who is a citizen of the State in which the suit is brought, the defendant must deny this allegation by a plea in abatement, if it is untrue, and cannot set up that defense on the trial after a plea to the merits, or in any other manner."

In this case the fact of non-residence does not oust the jurisdiction of the court if the defendant appears and answers the complaint; he cannot, after such voluntary appearance, object to the jurisdiction. By his answer he waives the service of a summons, places himself on the footing of a resident defendant, and subjects himself to the jurisdiction of the court.

2. Was a demand necessary before the commencement of the action? The warrants and orders were received by the defendant as a pledge to hold as collateral security for the note, with power to sell and apply on this indebtedness. If the property had been misapplied or disposed of, in violation of the contract under which it was held, the pledgor could have proceeded against the pledgee as in trover, for the unlawful conversion of the property.

If it had been applied to its proper use under the contract, and the parties disagreed as to the amount that had been or should be so applied, an action to compel an accounting would have been an appropriate remedy. But the plaintiff declares as for money held and received. The nature of the transaction, and the liabilities thereby created, do not come within the scope of such an action. The property was rightfully received and sold by the de-

fendant. The only dispute between the parties is as to the amount paid for interest upon the note. An action for an accounting would have settled this question. There has been no settlement between the pledgor and the pledgee. There is nothing due until there is a settlement. The property came rightfully into the possession of the pledgee. He has the right to retain it until by a settlement, or on accounting, the amount remaining due is ascertained. No demand could be made until this amount is determined, and a demand is necessary. A party receiving money to the use of another is rightfully in possession until the same is demanded. In general an action to recover money received by the defendant, in the character of trustee, cannot be maintained until after a demand, or proof in some other way, that there has been an abuse of the trust.

When goods have been intrusted to an agent or factor to sell, no action will lie against him for the proceeds until demand. With stronger reason, the doctrine applies where property has been intrusted to a pledgee, with power to sell and apply the proceeds to the payment of debts. In such a case there could be no valid demand until a settlement had been had and the amount due ascertained, for, until such time, the pledgee is in the rightful possession of the property. *Sears v. Patrick*, 23 Wend. 528; Story on Bailments, 339, 107.

This case is to be distinguished from that of *Stacy v. Graham*, 14 N. Y. 497, relied on by appellant to show that no demand was necessary. In that case the court say, that the defendant received the fund under a positive duty to remit, and, having violated that duty, became immediately liable, and no demand was necessary in order to maintain the action. No such state of facts exists in the case under consideration. The pledgee was rightfully in possession of the property; he had an ownership therein; and he was under no obligation to remit or to account until a demand had been made. There was nothing upon which to base a demand until there had been an accounting or settlement. And the pledgee had the right to retain possession until his liability had been fixed. Up to that time he had a special ownership in the property and a right to the possession thereof.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

AUGUST TERM, 1876, HELD IN HELENA.

Present :

HON. HIRAM KNOWLES,	} ASSOCIATE JUSTICES.
HON. HENRY N. BLAKE.	

STAPLETON, appellant, v. PEASE, respondent.

UNDERTAKING ON APPEAL. The undertaking on appeal must comply substantially with the statute.

SAME—*excess in penalty.* An undertaking on appeal, which is executed in the penal sum of \$500 when the statute fixes the same at \$300, is valid.

Appeal from Second District, Beaverhead County.

CHUMASERO & CHADWICK, for the motion to dismiss the appeal.

JOHNSTON & TOOLE, contra.

BLAKE, J. The respondent moves to dismiss this appeal because the proper undertaking has not been filed. The statute

requires that the undertaking on appeal shall be executed "to the effect that the appellant will prosecute his appeal with effect, and will pay all damages and costs which may be awarded against him on the dismissal or trial of the appeal, not exceeding \$300." Sts. 8th Sess. 50, § 5. The undertaking in this case contains the following condition: "The said plaintiffs will prosecute their appeal with effect, and pay all costs and damages which may be awarded against plaintiffs and in favor of defendants on said appeal, either by the dismissal or the trial of said appeal, not exceeding the sum of \$500." The undertaking recites that the judgment has been recovered for the possession of a certain quartz lode, and costs (\$182.50); that plaintiffs are desirous of appealing from the judgment to the supreme court, and that the court has ordered that an undertaking be given in the sum of \$500, as security for the costs and damages on the appeal, and a stay of proceedings in the land office. It appears that the court made an order that all proceedings be stayed upon the filing of a bond in the sum of \$500. The respondent contends that the undertaking has been given according to this order, and that there is no undertaking to render this appeal effectual.

It is not necessary for us to determine the sufficiency of the undertaking under the order of the court below. We are satisfied that it sustains this appeal. The undertaking complies substantially with the statute, and secures to the respondent all that the law designed for him. Voorhies' Code (10th ed.), 541 c; *Zoller v. McDonald*, 23 Cal. 136.

The execution of the undertaking in a sum which exceeds that fixed by the statute does not affect its validity. *Ex parte Eastabrooks*, 5 Cow. 27; *Zoller v. McDonald*, *supra*.

The motion is overruled.

Motion overruled.

FABIAN, appellant, v. COLLINS, respondent.

PRACTICE — *application for temporary injunction — report of referee upon facts.*

F. applied for an injunction, pending suit, to restrain C. from diverting water from a certain ditch. Under a rule of the district court, C. was ordered to show cause before a referee, who was appointed to take the testimony and report the facts. C. filed an answer, but did not offer any evidence, and moved to dissolve the temporary restraining order. The referee found that the testimony supported the material allegations of the complaint of F. No exceptions were taken to the findings, and the court dissolved the order. *Held*, that the motion of C. was irregular practice; that the facts reported by the referee had the effect of a special verdict; and that the court erred in ignoring the findings of the referee and dissolving the order.

STATUTORY CONSTRUCTION — *appointment of referee — injunction.* The two hundred and twenty-third, two hundred and twenty-fourth, two hundred and twenty-seventh and five hundred and eighty-first sections of the Civil Practice Act confer upon the district courts the power to appoint a referee to take the testimony and report the facts, upon the application of a party for a temporary injunction.

NATURE OF INJUNCTION. Under the Civil Practice Act an application for a temporary injunction is a motion for an order.

FACTS ON WHICH A TEMPORARY INJUNCTION IS GRANTED. The referee, appointed by the court in this proceeding, reported that F. is the owner and entitled to the use of the water described in the complaint; that C. has wrongfully diverted the same from F.; and that C. threatens to continue to divert said water. *Held*, that F. is entitled to an injunction pending suit.

Appeal from Third District, Lewis and Clarke County.

THE complaint alleged, and the referee found, that the plaintiffs were in the possession of certain water and were the prior appropriators thereof; that defendants had unlawfully diverted the same to the great damage of the plaintiffs; and that the injury threatened to be continuous. The plaintiffs applied to WADE, J., for the temporary injunction.

H. M. PORTER and WOOLFOLK & BULLARD, for appellant.

The object of the order to show cause is to present the case on its merits. *Hicks v. Michael*, 15 Cal. 107.

Respondents disregarded the order of the court to show cause. Appellants are clearly entitled to the injunction. Respondents

had no right to move to dissolve the restraining order. The referee found all the allegations of the complaint sustained by the evidence. The unlawful diversion of water, and threats that the diversion will be continuous, have been often held good cause for injunction. *Tuolumne W. Co. v. Chapman*, 8 Cal. 392; *Rupley v. Welch*, 23 id. 452; *Hill v. Smith*, 27 id. 476.

The findings of the referee are like the special verdict of a jury. *Edwards on Referees*, 147, 149; Civ. Pr. Act, § 227; *Brady v. Brown*, 20 Cal. 520; *Peck v. Vandenburg*, 30 id. 11. The report of the referee could only be set aside by exceptions properly saved. *Edwards on Referees*, 140; *Grayson v. Guild*, 4 Cal. 122.

The court clearly erred in basing his decision upon the comparative value of the conflicting rights of appellants and respondents. *Weaver v. Eureka L. Co.*, 15 Cal. 274; *Gregory v. Nelson*, 41 id. 279.

SHOBER & LOWRY, for respondent.

An application to a court of equity for the exercise of its prohibitory power must be sanctioned by the clearest principles of justice. *Hilliard on Injunc.* 11.

Clear, legal or equitable rights, free from reasonable doubt, must be shown to authorize a preliminary injunction. *Hilliard on Injunc.* 10.

The granting, or refusal to grant an injunction, rests in the discretion of the court. The court is sometimes required to balance the inconvenience likely to be incurred by the parties, and withhold an injunction, if one of the parties might suffer irreparable damage. *Hilliard on Injunc.* 22.

This case is of that character. The appellants have been indemnified by a bond executed by respondents. It requires a very strong case for an injunction, to justify the granting thereof, when such an act would cause infinitely more damage than it would remedy. *Atchison v. Peterson*, 1 Mon. 570.

KNOWLES, J. The plaintiffs made an application to the judge of the third judicial district, at chambers, for an injunction pending suit to restrain the defendants from diverting water from their ditch. The judge, upon the complaint of plaintiffs, granted

to them a restraining order enjoining the defendants from diverting said water until the further order of the judge, and, in accordance with the nineteenth rule of said district court, ordered the defendants to show cause before C. O. Ewing, Esq., why said injunction should not be granted, pending suit, and referred the matter to said Ewing to take the testimony and report the facts. At the hearing before the referee, the plaintiffs produced testimony to support their complaint. The defendants appeared and filed their answer to the complaint, but made no further showing. This answer was treated as an affidavit by the referee. To this no objection was made. From the evidence before him, the referee made the following report as to the facts:

That from the evidence on the part of the plaintiffs, said plaintiffs were, on the 19th day of April, 1876, and prior thereto, the owners of that certain water ditch described in said plaintiffs' complaint; that defendants diverted the water from said ditch; that, in his opinion, the material facts charged in plaintiffs' complaint are true and have been sufficiently proven before him.

The defendants, upon the filing of their answer, moved the dissolution of the restraining order, granted pending the hearing under the order to show cause. The hearing of this motion was had before the said judge and granted. This the plaintiffs assign as error. The object of this action was the procuring of a permanent injunction. It would seem that the defendants ignored the order to show cause, and made their motion as though an injunction pending suit had been granted upon the complaint alone. This certainly was not proper practice. 1 Whittaker's Pr. 477. If the defendants considered their answer a sufficient showing, then their course should have been to have objected to the findings of fact by the referee and brought the case to a hearing on their exceptions, or upon the report of the referee to resist the application of the plaintiffs for an injunction pending suit. Where an order to show cause has been made and testimony material to the issues produced, the denying of the equities of a complaint by an answer is not always sufficient. And where there is such evidence, as it appears was produced before the referee in this case, this denial is not at all sufficient.

The question of some importance presented in this case is this: What was the effect of the report of the referee upon the facts? The statute provides that a reference may be made when a question of fact other than upon the pleadings arises, upon motion or otherwise, at any stage of the action. Civ. Pr. Act, § 223. It also provides that the court or judge may appoint a referee when the parties do not agree upon one. *Id.*, § 224. If these provisions of the statute give a judge power to make a reference in such a case as this, then we have a provision thereof which provides what the force of the report shall be: "When the reference is to report the facts, the finding reported shall have the effect of a special verdict." *Id.*, § 227. If the power to order a reference arises from the general chancery powers vested in the court or judge, who at chambers has in certain matters the same power as a court, and the power to establish the nineteenth rule of said court arises from the provision of the statute, which provides that the supreme court and each district court shall have power to make rules and regulations for governing their practice and procedure in reference to all matters not provided for by law (Civ. Pr. Act, § 581), then I think we must refer to the former chancery practice to determine whether the course followed by the learned judge in this case was correct. For the practice, at least, should be analogous, if it does not coincide with that. Tested by its rules, the practice pursued in this case was irregular. The report of the referee should have the force of the report of a master in chancery. Under the chancery practice, this report should have come before the judge on a motion for its confirmation, and the judge could have determined whether or not it was proper to confirm the same. If it had been confirmed, the course of the judge would have been plain. The findings of fact would have been the basis of a decree or order. If not, then it should have been referred back to the referee with instructions to amend the same. No motion was made to confirm this report. No exceptions were made to it. No action was taken thereon. But it is unnecessary to show further wherein the action in this case differed from the former chancery practice, as I deem the power the judge had to order this reference and appoint the referee was derived from the provisions of the statute above referred to.

What was sought here was an injunction, which under our statute is nothing more than an order, and the application for an order is a motion. Civ. Pr. Act, tit. 5, ch. 3, and § 566. In determining this motion, certain facts the judge deemed it proper should be ascertained, and for this purpose ordered a reference. This was not a question of fact arising in the pleadings. In granting a temporary injunction there may be no facts that would warrant the same set forth in the pleadings. Take for instance the second and third grounds specified in the statute for a temporary injunction, and usually the facts that warrant the injunction are set forth in the affidavits. They may be set forth in affidavits altogether. In these cases there can be no doubt but that the issue of fact does not arise upon the pleadings, but upon the motion. The affidavits are made in support of the motion. It would be singular if the framers of such a code as ours should have intended that upon the second and third grounds for an injunction the issue of fact should arise upon a motion, but that on the first ground it should arise upon the pleadings. The truth is that in many cases there may be no issue of fact presented, when the application for an injunction is heard upon the pleadings. When the application in this case was made, no issue of fact was presented upon the pleadings. And the reference could just as well have been heard if no issue of fact in the pleadings had been presented up to its close. A temporary injunction, such as is provided for by the Code, is no part of the final relief to which a plaintiff is entitled. This relief is asked in the application or motion for the temporary injunction. I consider that a complaint which is used on the application for a temporary injunction is used merely in support of the motion, and for this purpose is in the nature of an affidavit, as the answer is usually considered in opposing the motion. The injunction provided for under the Code is a provisional remedy, that is, a remedy for the present need, a temporary relief as contra-distinguished from the final relief sought by the action. It is not the subject of an action, but in aid generally of the final relief asked in an action. Hence, there must always be an action commenced before an injunction issued under the provisions of the Code would have any force. For the purpose of showing the pendency of an action, the com-

plaint would always be a necessary part of the evidence in support of the motion. Again, the facts found on an application for a temporary injunction are conclusive upon no issue in the pleadings, but upon the motion only. For these reasons, I think there can be no doubt that the issue of fact that arises in this case was upon the motion and not upon the pleadings, and that the power to make the reference in this case came from the provisions of the Code, and hence the report of a referee has the force of a special verdict. A court or judge has no right to ignore a special verdict. It may be set aside for legal reasons. Was the report of the referee set aside? There was no motion to set it aside. The judge based his ruling upon other grounds than those appearing in the report, namely: That it does not satisfactorily appear that the mining ground of plaintiffs was not worked out, nor that they own other claims that can be mined with this water; that plaintiffs have failed to show that their mines will pay to work; and lastly, that it would be a greater damage for the defendants to be deprived of this water, than for the plaintiffs to be deprived of the same. Such considerations as these should have no weight against the report of the referee, and cannot be considered as setting it aside. If the plaintiffs are the owners of the water in dispute, they have a right to use it on mines mostly worked out, or prospect for more mines, or hold the same to sell to other parties, even to these defendants. Certainly the burden of proof should not be put upon the plaintiffs to show that their mines were not worked out, or that they did have other mines. It was not necessary for the plaintiffs to show that their mines would pay to work, to entitle them to use their own water. They have the right to try and make them pay. And lastly, the rule that would allow one man to take the water of another, because he can make more money out of it, would render insecure all water rights, in fact, the tenure of property generally. *Weaver v. Eureka L. Co.*, 15 Cal. 271.

The judge, confronted with the report of the referee, was bound to base his order upon it, as long as it remained in force. With such a report there was no judicial discretion left to him but to grant the motion for the temporary injunction. To hold otherwise would be resting the right to an injunction, pending suit, upon the caprice, and not the legal discretion of the judge.

was error in the judge to practically ignore the order of reference he had made, and the report of the referee. The hearing should have come up before the judge on an application for an injunction pending suit on the report of the referee. If the report was insufficient to warrant the order, then it should be denied. If defective, the case should be referred back, with directions to the referee to amend his report. Whether the reference was made under the power conferred upon the judge by the statute, or under the general chancery powers of the judge or court, the judge had no right to entertain the motion of the defendants. The application was on the part of the plaintiffs, and they had a right to a hearing upon their own motion. For these reasons we hold that the judge erred.

The order made in this case at the instance of the defendants is set aside and revoked, and the cause remanded for further proceedings.

Exceptions sustained.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

AT THE

JANUARY TERM, 1877, HELD IN HELENA.

Present:

HON. DECIUS S. WADE, CHIEF JUSTICE.
HON. HIRAM KNOWLES, } JUSTICES.
HON. HENRY N. BLAKE, }

RYAN, appellant, *v.* GILMER, respondent.

EVIDENCE — *declarations of driver of coach about accident.* R., a passenger for hire, sued G., a common carrier of passengers, to recover damages for injuries caused by the overturning of G.'s sleigh. At the trial, R. offered in evidence the following statements of G.'s driver, which were made immediately after the accident and while he was in charge of the sleigh: "He could have avoided the overturning of the sleigh if he had been paying the slightest attention. It was his carelessness and there was no necessity for it." *Held*, that the statements were not within the scope of the driver's authority, and were not admissible against G.

CARRIERS OF PASSENGERS — *proof of negligence.* It appeared at the trial that G.'s driver had complete control of the sleigh, and the horses were traveling about six miles per hour over a good level road, when the sleigh turned suddenly on one side and threw R. from his seat and thereby inflicted a personal injury. R. could not prove the cause of the accident.

and did not contribute thereto, and was nonsuited. *Held*, that the proof of the occurrence of the accident and infliction of the injury established a *prima facie* case of negligence against G., and should have been submitted to the jury.

CONTRACT OF PASSENGER CARRIERS. In the absence of a special contract, common carriers of passengers are required to carry passengers as safely as human foresight and reasonable care will permit.

Appeal from Third District, Lewis and Clarke County.

THE judgment of nonsuit was entered by WADE, J.

CHUMASERO & CHADWICK and J. G. SPRATT, for appellants.

The court erred in excluding the declarations of the driver, made at the time and immediately after the accident. *Morse v. Connecticut R. R.*, 6 Gray, 450; *Matteson v. N. Y. Central Co.*, 62 Barb. 364; *Price v. Powell*, 3 N. Y. 325; *McCormick v. Barnum*, 10 Wend. 105; *Barclay v. Howell*, 6 Pet. 498.

The court erred in not submitting the question of negligence on the part of respondents to the jury, and in ordering the judgment of nonsuit. *Shearm. & Redf. on Negligence*, 329, 330; *Whart. on Negligence*, §§ 627, 661; *Feital v. Middlesex R. Co.*, 109 Mass. 398; *Mauzy v. Talmadge*, 2 McLean, 161; *Fairchild v. California S. Co.*, 13 Cal. 602; *Stokes v. Saltonstall*, 13 Pet. 181; *Boyce v. California S. Co.*, 25 Cal. 467; *Curtis v. Rochester & S. R. Co.*, 18 N. Y. 542; *Derwort v. Loomer*, 21 Conn. 246.

The doctrine of contributory negligence does not apply to this case. Appellants did not contribute to the overturning of the sleigh. *Shearm. & Redf. on Negligence*, 32, 36, 37; *Whart. on Negligence*, § 301; *Richmond v. Sacramento V. R. Co.*, 18 Cal. 357; *Needham v. S. F. & S. J. R. Co.*, 37 id. 422; 2 Pars. on Cont. 226-228.

W. F. SANDERS and JOHNSTON & TOOLE, for respondents.

Appellants could not recover if they failed in establishing one of these propositions, that the alleged injury was caused by the negligence of respondents, and that the jury, from the evidence, could compute the damages for which respondents were liable.

The question of negligence is a mixed one of law and fact. When facts are presented the court determines whether or not negligence is established. The court should nonsuit a party if it would set aside a verdict in his favor for want of evidence to support it. Questions of negligence are not exceptions to the rule. *Allgro v. Duncan*, 24 How. Pr. 210; *Pratt v. Hull*, 13 Johns. 334; *Stuart v. Simpson*, 1 Wend. 376; *Demeyer v. Souzer*, 6 id. 436; *Wilds v. Hudson R. Co.*, 24 N. Y. 430; *Dickens v. N. Y. Central R. Co.*, 38 id. 21; *Carsley v. White*, 21 Pick. 256; *Johnson v. Hudson R. Co.*, 20 N. Y. 65.

The declarations of the driver were clearly outside of his agency. Sto. on Agency, §§ 144, 145; Angell on Carr., §§ 461, 462, 434-442; 1 Nash's P. & Pr. 505, 506; *Luby v. Hudson R. Co.*, 3 Smith (N. Y.), 131.

The complaint set out a special contract, not implied or created by law. Appellants must prove it as laid. Story on Bailm., §§ 601, 602.

Neither the court or jury can apportion negligence and render a judgment or verdict for damages, when both contributed to the negligence causing the injury, or the result or consequences after the injury. *Rathbun v. Payne*, 19 Wend. 401; *Button v. Hudson R. Co.*, 18 N. Y. 251; *Spooner v. Brooklyn R. Co.*, 31 Barb. 419; *Parker v. Adams*, 12 Metc. 415; *Harlow v. Humiston*, 6 Cow. 191.

BLAKE, J. The appellants are husband and wife, and bring this action to recover damages for a personal injury sustained by the wife, December 15, 1873, in consequence of the alleged negligence of the respondents. At this time the respondents were carriers of passengers in the Territory and received the fare from appellants for their transportation from Watson to Helena. At a point near Beavertown, the respondents' sleigh or "bob-sled," in which the passengers were being conveyed, was turned suddenly on one side and Mrs. Ryan, one of the appellants, was thrown about seven feet from her seat and received the injury described in the complaint. At the trial, the court sustained the motion of the respondents for a nonsuit and we are called upon to review this ruling.

In this class of cases it is the well-settled rule that it was necessary for the appellants to prove that there was no negligence, or want of due and reasonable care on their part which contributed to the injury, and that it was caused entirely by the want of such care on the part of the respondents. *Southworth v. O. C. & N. R. Co.*, 105 Mass. 342. In this action the accident was not the effect of any act of the appellants, and there is only one question before us for determination. Did the evidence tend to prove that the sleigh was overturned by the negligence of the respondents, or their servant?

The appellants claim that the court erred in excluding the declarations of the driver of the respondents, which were made immediately after the accident and during the time that he was engaged in the performance of his duties. He then said that he was sorry that she (Mrs. Ryan) was hurt; that he could have avoided the overturning of the sleigh if he had been paying the slightest attention; and that it was his carelessness, and there was no necessity for it. The representations or admissions of this agent will bind the respondents, if they were made within the scope of the authority which had been confided to him. Story on Agency, § 134. We think that an examination of the following cases shows that this principle is not applicable to the statements of the respondents' driver, which the appellants sought to prove in the court below. In *Luby v. Hudson R. R.*, 17 N. Y. 131, it was held that the declarations of the driver of a car, which had run against and injured a person, made after the accident occurred and while he was in charge of the car, that he could not stop the car because the brakes were out of order, were not competent against the company that employed the driver. In *Robinson v. Fitchburg R.*, 7 Gray, 92, which was an action against a railroad corporation for damages caused by a collision through the negligence of the engineer, it was held that the declarations of the engineer respecting the accident, made a number of days afterward, were not competent against the company. The supreme court of the United States has recently considered the same question in *Packet Co. v. Clough*, 20 Wall. 528. It was held that the conversation of the captain of a steamboat with a party who was injured in going upon the boat, made two and

one-half days after the accident occurred, in which he stated that the injury was caused by the carelessness of the hands in failing to put out the regular plank, was not competent against the owners of the boat. Mr. Justice STRONG, in delivering the opinion of the court, said: "But an act done by an agent cannot be varied, qualified or explained either by his declarations, which amount to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done at a later period. 1 Taylor on Evidence, § 526. The reason is that the agent to do the act is not authorized to narrate what he had done or how he had done it, and his declaration is no part of the '*res gestæ*.'" In a later case, the same high tribunal held that "the opinion of an agent, based upon past occurrences, is never to be received as an admission of his principals * * * ." *Insurance Co. v. Mahone*, 21 Wall. 157. Sir WILLIAM GRANT discusses this proposition in *Fairlie v. Hastings*, 10 Ves. 123, and says: "If any fact, material to the interest of either party, rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion." Story on Agency, § 136, and cases there cited; *Anthony v. Estabrook*, 1 Col. 76, and cases there cited; *M. & M. R. Co. v. Finney*, 10 Wis. 388.

In the case at bar, what the driver said to the appellants concerning the accident was the narrative of a past occurrence and could not affect the liability of his principals. In the authorities which have been referred to, the number of hours or days that elapsed after the occurrence of the accident complained of, and during which the agent made certain admissions against his principal, is treated as an immaterial fact. If they were uttered before the journey upon which the injured party entered was ended they were mere narration. When the respondents' driver made the statements to the appellants, which have been specified, "the accident was past," and the injury to Mrs. Ryan was complete. "The only wrong she sustained, if any, had been consummated." *Packet Co. v. Clough*, *supra*. Therefore the court did not err in excluding the declarations of the respondents' driver.

It will be necessary to state the testimony of the appellants relating to the alleged negligence of the respondents, to show the nature of the legal question which must now be considered. It

appears that the appellants had been conveyed in a coach from Watson to a point which is south of Beavertown, where the sleigh or "bob-sled" was furnished by the respondents for the purpose of transporting the appellants and express matter and mail sacks. When the accident took place the parties were traveling upon a good level road at the rate of about five or six miles per hour, and the snow on the ground made fine sleighing. The horses were strong and under the control of the respondents' driver and were stopped immediately, without any difficulty, and the sled did not run out of the road or track. The appellants know of no cause for the upsetting of the sleigh, although Mr. Ryan, one of the appellants, made a careful examination at the time for the purpose of discovering it. Upon this subject, the evidence does not enlighten us.

When these facts are reviewed it will be seen that only one question can be discussed. Did the appellants support their allegation of negligence on the part of the respondents by producing testimony, which tended to prove that the accident occurred, without the fault of the appellants, under the circumstances which have been pointed out?

The complaint in this case contains the same allegations as the declaration at common law in similar actions. No contract between the appellants and respondents is set forth in the pleadings, or mentioned in the evidence, which is in conflict with the obligations that the law has imposed upon the respondents as common carriers of persons. The appellants were passengers for hire. What was the duty of the respondents? They were required to carry the appellants from Watson to Helena as safely as human foresight and reasonable care would permit. The nature and limitations of this obligation have been defined accurately in the following authorities. "Carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient and suitable coaches, harnesses, horses and coachmen in order to prevent those injuries which human care and foresight can guard against." *Ingalls v. Bills*, 9 Metc. 1. The proprietor of a stage-coach covenants that he will insure the safe carriage of passengers by the exercise of extraordinary diligence and care, and is responsible for any neglect. *Fairchild v. California S. Co.*, 13 Cal. 605.

“Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a carrier of passengers for hire the utmost care and skill which prudent men are accustomed to use under similar circumstances.” Shearman & Redfield on Negligence, § 266, and cases there cited; Story on Bailments, § 601; *Ficken v. Jones*, 28 Cal. 627; *Wheaton v. N. B. & M. R. R. Co.*, 36 id. 583; *Stokes v. Saltonstall*, 13 Pet. 181; *The Nitro-Glycerine case*, 15 Wall. 537; Angell on Carriers, §§ 521-524, 568, and cases there cited; Wharton on Negligence, § 627, n. 3; 2 Kent's Com. 601 and notes.

Did the respondents violate any of these duties which were incumbent upon them? The respondents had the exclusive control and management of the sleigh when it was upset. The nature of the accident has been explained by the testimony. Should the question whether there was a want of due and reasonable care on the part of the respondents have been submitted to the jury? The sufficiency and effect of the evidence on behalf of the appellants appear to be determined in many cases. The supreme court of the United States has considered these questions. In *Stokes v. Saltonstall*, 13 Pet. 181, the plaintiff commenced an action to recover damages for an injury sustained by his wife by the upsetting of a stage-coach in which she was a passenger. The court held that “the facts that the carriage was upset, and the plaintiff's wife injured, are *prima facie* evidence that there was carelessness, or negligence, or want of skill on the part of the driver, and throws upon the defendant the burden of proving that the accident was not occasioned by the driver's fault.” In *Railroad Co. v. Pollard*, 22 Wall. 348, the doctrine of the case of *Stokes v. Saltonstall*, *supra*, was attacked by the counsel for the plaintiff in error, but Mr. Chief Justice WAITE said: “We see no necessity for reconsidering that case.” In *The Nitro-Glycerine case*, *supra*, Mr. Justice FIELD delivered the opinion and said: “The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier being to carry safely, the proof of the injury usually establishes a *prima facie* case, which

the carrier must overcome. His contract is shown, *prima facie* at least, to have been violated by the injury." In *Boyce v. California S. Co.*, 25 Cal. 460, the plaintiff brought the action to recover damages on account of personal injuries sustained by him by reason of the upsetting of the defendant's coach on which he was a passenger. Mr. Chief Justice SANDERSON delivered the opinion and said: "Admitting for the sake of the argument, that the allegation of negligence is as narrow as counsel for appellant claims it to be, and that the cause of the accident is unexplained by the testimony, and that the general reputation of the driver for care and skill is established beyond question by the evidence, it does not follow that the overturning of the coach is to be charged to the account of unavoidable accident, or to some cause which human care and foresight could not prevent, and therefore the defendant excused from all liability for the consequences to the plaintiff. The argument places the burden of explanation upon the shoulders of the plaintiff; but, unfortunately for the argument, the law places it upon the shoulders of the defendant. Upon the trial of an action of this character, it is only necessary for the plaintiff to prove the overturning of the coach and the injuries caused thereby. Having done this he may rest, for the presumption is that the overturning occurred through the negligence of the coachman, and the burden of proving that there has been no negligence is cast upon the defendant. How the overturning occurred is no part of the plaintiff's case. The fact that the coach did overturn is all that he need establish in order to recover for such injuries as he may have sustained. In order to rebut this presumption of negligence, the defendant must show that the overturning was the result of inevitable casualty, or some other cause which human care and foresight could not prevent, for the law holds him responsible for the slightest negligence, and will not hold him blameless except upon the most satisfactory proofs. In doing this the defendant must necessarily explain how the overturning occurred, and if he fails to do this, the presumption of negligence remains. * * * Counsel, by admitting that the overturning occurred, to the personal injury of the plaintiff, and that such overturning is unexplained by the evidence, admits that a cause of action has been established, against

which he has shown no defense." In *Yeomans v. C. C. S. N. Co.*, 44 Cal. 84, the case of *Boyce v. California S. Co.*, *supra*, was affirmed, and the court refers to "the application of the well-settled principle, that as between a passenger and a common carrier of passengers, the proof of the occurrence of an accident, without fault of the passenger, is *prima facie* proof of negligence on the part of the carrier." The legal principles which have been announced are applicable to this case, and are sustained by the authorities. Story on Bailments, § 601, *a*; *Fairchild v. California S. Co.*, *supra*; *Ficken v. Jones*, *supra*; *Feital v. Middlesex R. Co.*, 109 Mass. 405; Angell on Carr., §§ 61, 569, and cases there cited; Shearman & Redfield on Negl., § 280, and cases there cited; *McKinney v. Neil*, 1 McLean, 540; *Stockton v. Frey*, 4 Gill. 406; *Farish v. Reigle*, 11 Gratt. 697; *Wilkie v. Bolster*, 3 E. D. Smith, 327.

It follows that there was evidence relating to the alleged negligence of the respondents, which should have been submitted to the jury. The court erred in assuming that the testimony did not have a tendency to prove that there was a want of due and reasonable care on the part of the respondents. The authorities which have been cited refer to the upsetting or overturning of a coach or wagon. The respondents used voluntarily a sleigh or "bob-sled" upon a portion of the route between Watson and Helena, and allege in their answer that this means of conveyance was the most convenient and suitable at the place where the accident occurred. There is nothing in the character of this vehicle which modifies the rules of law that have been referred to.

It is therefore ordered that the judgment of the court below be reversed with costs, and that the action be remanded for a new trial.

Judgment reversed.

KNOWLES, J., concurred.

WADE, C. J., dissenting. I hold, with the majority of the court, that the declarations of the driver were properly excluded, but as to the other branch of the case I have serious doubts as to the correctness of the decision and express my own views upon the question as follows:

The general though not the uniform doctrine of the laws is that, where the plaintiff in a case of this character proves his journey on the coach, the accident and the damages he has suffered, he thereby makes a *prima facie* case against the coach owner or proprietor, and that negligence on the part of such owner is thereby implied and presumed, and the burden is upon him to rebut such presumption.

In the case of *Christie v. Griggs*, 2 Camp. 79, Chief Justice MANSFIELD says: "I think the plaintiff has made a *prima facie* case by proving his going on the coach, the accident and the damage he has suffered. It now lies on the other side to show that the coach was as good a coach as could be made, and that the driver was as skillful a driver as could anywhere be found * * * When the breaking down or overturning of a coach is proved, negligence on the part of the owner is implied. He has always the means to rebut this presumption, if it be unfounded, and it is now incumbent on the defendant to make out that the damage in this case arose from what the law considers a *mere accident*."

The case of *Stokes v. Saltonstall*, 13 Pet. 181, decided by the supreme court of the United States, and which therefore may well be taken as our guide here, sustains the decision in *Christie v. Griggs* and substantially decides that where the plaintiff proves his going on the coach, the accident and the injury, negligence on the part of the defendant is presumed and can only be rebutted by proof.

Many other cases might be cited to the same effect. See *Ware v. Gay*, 11 Pick. 106; *Stockton v. Frey*, 4 Gill. 406; *McKenney v. Neil*, 1 McLean, 540; *Farish v. Reigle*, 11 Gratt. 697; *Brehm v. Great West. R. R. Co.*, 34 Barb. 256; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Ingalls v. Bills*, 9 Mete. 1.

Granting that these cases conclusively establish the doctrine that proof of the accident and the injury raises the presumption of negligence against the defendant which must be rebutted by proof, there is nothing in any of the books requiring this proof to come from the defendant only. The plaintiff himself, by his own evidence, may overthrow and destroy the presumption in proving the circumstances attending the accident.

The overturning of a stage-coach, or other accident, is always

the result of antecedent causes, and these causes must always give character to the result. A stage-coach may be overturned and occasion injury to the passenger without the fault or neglect of the proprietor or his agent; or by reason of such fault or negligence; or because of the fault or carelessness of the passenger; or in consequence of his contributory negligence, and the character to attach to such accident, the presumptions therefrom arising, and the liability thereby resulting are determined, not by the result alone but by the causes that produced it. And if the plaintiff takes it upon himself to show these causes, and thereby exonerates the defendant from all blame, he destroys the presumption which the bare proof of the overturning of the coach creates.

Now in the cases we have cited in which it is held that the presumption of negligence is fastened upon the defendant by proof of the accident and the injury, it will be seen that the attending facts and circumstances reasonably and naturally raise such presumption, as in the case of *Christie v. Griggs*, where the coach was overturned, and the injury resulted by reason of the breaking of an axeltree. Here the presumption must rest upon the attending cause rather than upon the bare fact that the coach overturned. And so in almost every other reported case wherein it is held that this presumption of negligence is fixed upon the defendant by proof of the accident and the injury, the antecedent facts revealing the cause of the accident, legitimately, and from their very nature, cause the presumption to arise. And it is impossible to say from the cases that this presumption would have arisen but for the surrounding facts and circumstances which imperatively demanded it. Certainly it is more reasonable to suppose that this burden is placed upon the defendant by the proof of a fact that naturally creates it, as the breaking of an axeltree, rather than to jump at the conclusion from the bare happening of the accident, as the overturning of a coach, which might occur without the defendant's fault.

The natural conclusion is that this presumption has some relation to and is somewhat dependent upon the manner of the accident and the causes that produced it.

Mr. Parsons (2 Parsons on Contracts, 224-5), after a careful interpretation and review of all the cases, arrives at a similar con-

clusion. He says: "The plaintiff must not merely prove that he has sustained injury, but must go so much further as to show that he suffered from such accident, or from such other cause as may, with *reasonable probability*, be attributed to the negligence of the defendant. Thus far the *onus* is on the plaintiff. But then it shifts, and the defendant must prove an absence of negligence or of default on his part."

That is to say, the plaintiff does not make his *prima facie* case by simply proving the accident and the injury, but he must show something of the nature and cause thereof, and such a state of facts attending the event as, with reasonable probability, causes the presumption of negligence to arise. And the facts proven by the plaintiffs in the reported cases demonstrate that they are in harmony with this rule, and show that the plaintiffs have always proved the attending circumstances and the cause of the accident, in order to cause the presumption of negligence to arise. A stage-coach may be overturned and injury result to the passenger without the fault of the owner or his agent, and from this fact alone the plaintiff ought to be required, in making his *prima facie* case, to show such a state of facts attending the accident as reasonably and naturally raises the presumption of negligence against the defendant. The action is negligence, and as long as the defendant might be without fault negligence ought to be shown, or such a state of facts as naturally causes the presumption to arise.

Either party may prove the surrounding facts and circumstances. If by the plaintiff, and he shows no facts which naturally and legitimately raises the presumption of negligence, or if he goes further, and shows the defendant without fault, he subjects himself to a nonsuit; if by the defendant, and he frees himself from fault or negligence, he recovers a verdict in his favor.

But however much doubt there may be, or if there be no doubt as to what proof causes the presumption of negligence to arise against the defendant, there certainly ought not to be any doubt whatever as to this rule of evidence; that if the proof by the plaintiff first establishes the presumption of negligence, and then absolutely destroys it, his case necessarily fails. And the application of this rule to the facts in the case forms the chief foundation for my opinion herein.

Adopt the doctrine, to the fullest extent, that the bare proof of the accident and the injury raises the presumption of negligence against the defendant, and yet there is no law or reason for holding that this rule of evidence must be upheld in a case where the plaintiff, after having raised the presumption, absolutely overthrows and destroys it by his own proof. If in proving the accident and the injury he goes beyond this and shows the defendant without fault, and exonerates him absolutely from all negligence and want of care, then his case must fail. He proves himself out of court, and leaves nothing for the defendant to do. And in such a case, in the event of a motion for nonsuit, it is the province of the court to pass upon the facts and ascertain if the plaintiff has made a case, and if there is no proof tending to show negligence, and, on the contrary, all the evidence repels the presumption, then such motion should be granted.

Now apply these principles to the case in hand. Do the facts tend to show that the injury to the plaintiff was occasioned under such a state of circumstances as, with reasonable probability, the same may be attributed to the negligence of the defendant? On the contrary, do not the facts conclusively prove the defendant without fault?

The testimony, as produced by the plaintiffs, shows that the defendant's sleigh, with the plaintiffs as passengers, and its load, had accomplished the task of crossing the Prickly Pear range of mountains without accident or trouble, notwithstanding the difficulties and dangers of that dangerous mountain pass, and had arrived in safety on this side of the range, demonstrating, beyond equivocation or doubt, that it was judiciously and properly loaded, and not overloaded, and at the time of the accident was on perfectly level ground, the team attached safe and gentle, and proceeding at a moderate pace, the driver sober, skillful, and showing the utmost care, having his horses under perfect control, as is evidenced by the fact that he stopped them still before they had proceeded eighteen inches after the happening of the accident, the harness in perfect order, the sleigh good and strong, and yet the accident occurred, and the sleigh overturned, and no one could explain the reason why or wherefore. There was no giving away of any part of the sleigh, or the harness, and no fault on the

part of the driver or the horses. Nothing was broken, and every thing in any way connected with the sleigh, the load, the harness, the horses and the driver, was in its place and in perfect order, when, upon a level road, the sleigh overturned while proceeding at the moderate rate of between five and six miles per hour.

This is the testimony, and what are the presumptions arising therefrom? None, it seems to us, adverse to the defendants, but all in their favor, showing them without fault, and presenting a case of as pure an accident as ever occurred, and an accident, too, the cause of which no one has yet been able to explain.

After the presentation of this evidence by the plaintiffs the defendants moved the court for a nonsuit. Now, in examining this evidence to ascertain if the plaintiffs had made a *prima facie* case, if the court followed the rule indicated by Mr. Parsons, it would not look to the accident alone, but would examine into the cause thereof and the attending facts as disclosed by the evidence, and would determine from such facts, if the presumption of negligence naturally and reasonably arises, for, to the extent of showing such a state of facts as raises this presumption, the *onus* is on the plaintiffs by this rule. And so examining the testimony, we say the facts and circumstances attending the accident do not naturally or reasonably raise the presumption of negligence, but, on the contrary, render such a presumption utterly impossible. Therefore the elements that make up the plaintiffs' *prima facie* case fail. If, however, the rule is invoked, that the bare proof of the accident and the injury makes the plaintiffs' case, we say it is not applicable to a case where the bare, naked presumption is utterly overthrown by absolute and undisputed facts. And that is this case. The facts established by the plaintiffs, of their own motion, imperatively and conclusively prevent any presumption from arising adverse to the defendants. And upon a motion for a nonsuit the court must place this bare, naked presumption by the side of the overwhelming absolute facts, and if the facts are imperative and conclusive in their nature, of which the court must judge, the motion should prevail. For these reasons I think the motion for a nonsuit properly granted.

TERRITORY, appellant, v. FLOWERS, respondents.

JURISDICTION OF OFFENSE OF ASSAULT AND BATTERY. The legislative assembly conferred upon the district court "jurisdiction of all offenses not cognizable in the probate or justice of the peace courts." F. was indicted at a term of the district court for the statutory crime of assault and battery, which was within the jurisdiction of the probate court. A demurrer to the indictment on the ground that the court had no jurisdiction was sustained. *Held*, that the district court, notwithstanding this statute, had jurisdiction of the crime under the ninth section of the Organic Act of the Territory, which confers upon it "common-law jurisdiction."

"COMMON-LAW JURISDICTION" DEFINED. Said clause, "common-law jurisdiction," refers to the right to hear and determine every case at law, excepting suits in equity and admiralty, and matters in courts-martial, and embraces criminal actions which are cases at law

CONCURRENT JURISDICTION OF CRIMES. The second section of the amendment to the Organic Act, approved March 2, 1867, which confers upon the probate court jurisdiction of certain "criminal cases," does not deprive the district court of its jurisdiction of the same. The jurisdictions in these cases are concurrent.

RULE FOR DETERMINING JURISDICTION OF COURTS. The jurisdiction of the courts created by the Organic Act is determined by referring to said act, the statutes of the Territory, and the general history of jurisprudence throughout the United States.

Appeal from Third District, Jefferson County.

THE demurrer was sustained by WADE, J.

J. G. SPRATT, District Attorney, First District, for appellant.

JOHNSTON & TOOLE, for respondents.

KNOWLES, J. The respondents were indicted for an assault and battery in the district court for the county of Jefferson. They demurred to the indictment on the ground that said court had no jurisdiction of such an offense. The court below sustained the demurrer, and the district attorney for the first judicial district, on behalf of the Territory and in its name, in accordance with the statute allowing the same, appealed the case to this court, and assigns this ruling as error.

The sixth section of the Criminal Practice Act of this Territory confers jurisdiction upon the district courts in these words: "The district court shall have jurisdiction of all offenses not cognizable in the probate or justice of the peace courts, and of all common-law offenses." Cod. Sts. 190, § 6. The punishment prescribed by our statutes for the crime of an assault and battery brings it within the jurisdiction of the probate court. Cod. Sts. 279, § 58. The grant of jurisdiction to the district court over "common-law offenses" does not meet the difficulty presented in this case. Although the crime of an assault and battery was known to the common law, it is a statutory offense, having been so created by our statutes. The clause of the statute which confers common-law jurisdiction upon the district court was intended to give that court cognizance of the offenses specified in the one hundred and eighty-fifth section of the Criminal Laws, which provides that "all offenses recognized by the common law as crimes, and not here enumerated, shall be punished * * *." Cod. Sts. 312, § 185. Unless the district court receives jurisdiction to determine this case from some other source than the statutes of the Territory it does not possess it.

The ninth section of the Organic Act of the Territory provides that the "supreme and district courts respectively shall possess chancery as well as common-law jurisdiction." The question presented to us is this: does this grant of jurisdiction to the supreme and district courts **authorize them to hear and determine such a cause** as the one before us, without any provision of the statutes of the Territory, or in contravention of its statutes. What does the term "common-law jurisdiction" imply? Bouvier describes courts in his Institutes as follows: "When considered as to the object of their jurisdiction, they are (1) courts of common law; (2) courts of equity; (3) courts of admiralty; and (4) courts-martial." * * * "Courts of common law are established to protect legal rights and to redress legal injuries. The remedies for the redress of wrongs and for the enforcement of rights are distinguished into two classes: first, those which are administered in courts of common law; and secondly, those which are administered in courts of equity. Rights, which are recognized and protected, and wrongs, which are redressed by the former

courts, are called legal rights and legal injuries." 3 Bouv. Inst. 72. Blackstone classifies wrongs as private and public. Public wrongs include crimes.

All wrongs are legal injuries. Common-law courts then have for one of their objects the redress of public wrongs, or in other words, the punishment of crimes. A court having common-law jurisdiction has the same jurisdiction as common-law courts. The only meaning that can be derived from the phrase "common-law jurisdiction," is the right to hear and determine cases at common law. This is what common-law courts were instituted for. It is believed that the language used in our Organic Act, "common-law jurisdiction," was intended to vest in the district courts and supreme court of the Territory the same jurisdiction as was possessed by all the superior common-law courts of England. The judicial system that prevailed in most of the States at the time the Organic Act was enacted by congress (of which the one for this Territory is a copy), included one court having jurisdiction of all common-law causes, civil and criminal, and that the intention of congress at that time, and when our Organic Act was passed, was to provide for a judicial system similar to that which had prevailed in most of the States, and which the great mass of the citizens of the United States were familiar with. Even while the oldest States were colonies of Great Britain, they never had a judicial system that coincided with that of the mother country. Generally, with them, one court had all of the original jurisdiction that was possessed by the several superior courts of common law in England, and this was said to possess common-law jurisdiction. See Graham on Jurisdiction, 139, 140, as to the jurisdiction of the supreme court of New York when that State was a colony. And here we have the origin of this phrase. A court that had common-law jurisdiction had the right to hear and determine every case that did not fall within the classes known as suits in equity or admiralty, or matters of which a court-martial took cognizance. It had the same jurisdiction as the combined jurisdictions of the several superior common-law courts of England. When a new legal right was created, or a legal wrong proscribed, it was not necessary to pass a statute giving any court jurisdiction of the same, for a court having common-law jurisdiction had so

general and enlarged a jurisdiction of all legal remedies, that it could take cognizance of any action involving the determination of the same. In the case of *Parsons v. Bedford*, 3 Pet. 433, it was held that suits at common law, as specified in the seventh amendment to the constitution of the United States, included all suits not of equity or admiralty jurisdiction, and was not confined to cases which were known to the old and settled proceedings at the common law. Suits at common law signify nothing more than cases at law. This is undoubtedly the proper construction of the phrase "common law," as used in our Organic Act. Actions at common law signified formerly every case not of equity or admiralty jurisdiction, or cases within the cognizance of a court-martial. Now cases at law occupy the same position. They embrace every class of cases not of one of these jurisdictions. If we take the above decision as a guide, cases at law and cases at common law are convertible terms, when applied to the jurisprudence of the United States. Both are used to designate a class of cases that are not known as equity or admiralty suits, or matters within the cognizance of courts-martial. Once this class of cases was known as cases at common law, now cases at law. Whenever then a case is known as one at law, or at common law, any court whose jurisdiction is described by the language, "law or common law," can take cognizance of it. A criminal action is one at law. It is a public wrong which is redressed by an action in the name of the people in their collective or aggregate capacity. A private wrong is redressed in the name of the party injured. An indictment with us is nothing but a pleading on the part of the Territory. From a review of the common-law writers, it will be seen that a criminal action is always classed as one at law. Chitty's Blackstone, bk. 3, pp. 1, 2; id., bk. 4, p. 4. "For pleas or suits are regularly divided into two sorts, pleas of the Crown, which comprehend all crimes and misdemeanors, wherein the king on behalf of the public is the plaintiff, and common pleas, which include all civil actions depending between subject and subject. Chitty's Blackstone, bk. 3, p. 40. Other authorities might be cited to the same point. An interpretation of this clause in our Organic Act has been made by the supreme court of the United States in the case of *Ferris v. Higley*, 20 Wall. 375. In referring to the lan-

guage "common-law jurisdiction," which occurs in the ninth section of the Organic Act of Utah (which section is the same as that of our Organic Act), the court says: "The common-law and chancery jurisdiction here conferred on the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of a civil or criminal cognizance, which can be litigated in a court of justice."

Chancery jurisdiction is well known. It does not embrace a cognizance of criminal cases. The right to hear and determine such cases must come under the grant of common-law jurisdiction. And it would seem that the proper construction of this language of that court would be that this grant of common-law jurisdiction included the right to hear and determine almost every criminal matter that "can be litigated in a court of justice."

It may also be observed that in the above case of *Ferris v. Higley*, the court derived what jurisdiction congress intended to confer upon the probate court of Utah, from the language of the Organic Act, and the history of the jurisprudence that generally prevails in the United States. It holds that the jurisdiction of the probate court of Utah must be confined to the probate of wills and matters of estates. The justice of the peace courts have a very limited jurisdiction. They were evidently intended as inferior courts. Where then are we to have a court with general and original jurisdiction of all cases at law, such as were the courts known as common-law courts in the several States, if it is not the district and supreme courts? Such I am confident is the character of our district court and so intended by the power that created it. Hence it would have jurisdiction of the case at bar because it is a case at law.

The fact that under the amendment to our Organic Act approved March 2, 1867, the probate court would have jurisdiction of this case, does not militate against the above views. Under the second section of this amendment "the probate courts of the Territory of Montana, in their respective counties, * * * are hereby authorized to hear and determine * * * such criminal cases arising under the laws of the Territory as do not require the intervention of a grand jury." It is not uncommon to find two courts having concurrent jurisdiction over the same class

of cases. We find that the court of common pleas and the king's bench, as organized by the jurisprudence of England, had concurrent jurisdiction over many subjects. Blackstone, bk. 3, pp. 37-42. The courts of the United States and the State courts have concurrent jurisdiction over many causes of action. This amendment to our Organic Act confers jurisdiction in certain "criminal cases" upon the probate court, but does not prohibit the same to the district court. We have seen that the district court had jurisdiction of this cause before this amendment was adopted. The amendment repeals the original act only so far as it is "inconsistent" with the same. Two statutes, that confer jurisdiction over the same class of actions to different courts, are not incompatible because, as we have seen, courts may, and frequently do, have concurrent jurisdiction. Nor is this conclusion inconsistent with the jurisdiction conferred by statute upon the courts of justices of the peace. The case of *Ferris v. Higley*, as before stated, bases its conclusion upon the ground that, in determining the jurisdiction of the courts created by our Organic Act, we are not only to recur to said act and the statutes of the Territory, but to the general history of jurisprudence throughout the United States and the characteristics thereof. Considering these, we find that the justice of the peace courts, which exist in most if not all the States, usually have had and now have about the same jurisdiction as has been conferred upon said courts by our statutes.

In the *Matter of Martin Conner*, 39 Cal. 98, it was held that, within the purview of the act of congress, approved April 14, 1802, conferring upon certain State courts the right to naturalize aliens, a court having jurisdiction of *some* common-law cases was a court of common-law jurisdiction. It cannot, however, have been the intention of the framers of our Organic Act, that the giving of the district and supreme courts jurisdiction over some law or common-law actions, would be a compliance with the terms used. The probate court originally had jurisdiction only of matters pertaining to estates and wills. The justice of the peace courts have by the terms of the Organic Act a very limited jurisdiction, and should the legislative power of the Territory confer upon the district and supreme court jurisdiction only of a few law cases, rightfully and in accordance with the provisions of the Or

ganic Act, then there would be a large number of cases that would fall within the jurisdiction of no court. The interpretation given to the phrase "common-law jurisdiction," as it occurs in said law, would not be a sufficient definition of the same words in our Organic Act. If there was any intention by the framers of our Organic Act to confer any jurisdiction by the terms used, of which there can be no doubt, there should be no narrow interpretation given them. It should be considered that something reasonable and beneficial was intended. If it was intended that the conferring of jurisdiction of one or two chancery cases and one or two law cases upon the district court would be a compliance with the proviso under consideration, then it might have been left out, for its practical effect would amount to nothing. If such an interpretation should be placed upon the limitation this proviso contains upon the legislative power of the Territory, it would be a very narrow one and hardly consistent with a reasonable intention. And then it would seem that, when it is said that a court shall have jurisdiction of law cases, the conferring upon it of jurisdiction of some law cases is not up to the full extent of the obvious meaning of the language used. The above decision in the *Matter of Martin Conner* defines common-law jurisdiction to mean the right "to try and decide causes which were cognizable by the courts of law under what is known as the common law of England." And yet it holds that the right to try some of these causes meets the definition. If the term "common-law jurisdiction" originated, as I apprehend, in defining the jurisdiction of one court, which had the jurisdiction of the several superior law courts of England, that is, the right to hear and determine all law actions, then there can be no limit in the law jurisdiction of a court whose authority to hear and determine cases is measured by such language. It should be borne in mind that the term "common-law jurisdiction" does not occur in describing the jurisdiction of any court in England, but that it is a phrase of American origin applied to American courts.

Therefore we find that the court below committed an error in sustaining the demurrer to the indictment.

Judgment reversed.

NOTE.—The section of the law which has been commented upon in this opinion was amended by an act, approved February 11, 1876, which provides that the district and pro-

bate courts shall have concurrent jurisdiction of certain misdemeanors, and that nothing in said law "shall deprive the district court of jurisdiction over such misdemeanor, as the grand jury may, of its own motion, take cognizance of." Sta. 9th Sess, 59.—REP.

CLARKE, respondent, v. GONU, appellant.

ORDER REFUSING TO STAY EXECUTION APPEALABLE. The judge at chambers made an order in May, 1876, and refused to stay until the next term of the court an execution upon a judgment which had been entered in December, 1874. *Held*, that this is a "special order made after final judgment," and therefore appealable.

REVIEW OF SAID ORDER—discretion. The making of said order is an exercise of judicial discretion, which will not be reversed unless there has been a clear abuse of this discretion.

Appeal from Third District, Lewis and Clarke County.

THE order appealed from was made by WADE, J. The respondent moved to dismiss the appeal.

CHUMASERO & CHADWICK, for the motion.

WOOLFOLK & BULLARD and H. M. PORTER, contra.

BLAKE, J. The respondents have filed a motion to dismiss this appeal. The following facts must be considered to enable us to understand the case. It appears that the respondents commenced an action in the court below against five persons, including the appellant, August 18, 1874, and a default was entered. The appellant moved to set aside the default November 3, 1874, on the ground that there had been no legal service of the summons upon him. The court overruled the motion December 10, 1874, and judgment was entered against said persons. The appellant then excepted to these rulings, but did not perfect an appeal. On May 8, 1876, the appellant applies to the judge of the court below, at chambers, for an order staying, as against him, an execution which had been issued in the action against said persons, "until a motion to quash said execution can be heard in said court at the next term thereof." The grounds of the motion to quash the execu-

tion are, that the judgment and execution are void because no summons was served upon the appellant. The application was denied, and from this ruling this appeal has been taken.

Has this appeal been taken "from any special order made after final judgment," provided for in the three hundred and eightieth section of the Civil Practice Act, which specifies the cases in which appeals may be taken "from the district courts?" We have been unable to find in the authorities a satisfactory definition of the term "special order." Mr. Bouvier says that a special rule is an "order of court made in a particular case, for a particular purpose; it is distinguished from a general rule, which applies to a class of cases." 2 Bouv. L. D. (14th ed.) 537. The decisions of the supreme court of California are conflicting upon this question. In *Gilman v. Contra Costa Co.*, 8 Cal. 57, it is said that this term refers to "cases where a court or judge grants affirmative relief, and cases where relief is denied." It has also been held that the order should "follow the judgment in the same line of proceeding." *Ketchum v. Crippen*, 31 id. 365. In *Pendegast v. Knox*, 32 id. 72, the court held that the order should follow the judgment in "logical sequence," or in some way depend upon it. This view is sustained in *Genella v. Relyea*, 32 id. 159, and *Quivey v. Gambert*, id. 304. These cases were reviewed in *Calderwood v. Peyser*, 42 id. 110, and overruled upon this point. Mr. Justice WALLACE says that the order, "*of itself*," shall be the subject of appeal, and that "the statute declares such an order, made subsequently in point of time to the rendition of the judgment, to be the subject of a distinct appeal, and we are not at liberty to add that it must also be an order made in the direct line of the procedure." Our Civil Practice Act provides that "every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion." § 566. This provision makes this ruling, from which this appeal has been taken, an order. It is subsequent in point of time to the rendition of the judgment, and therefore, according to the latest decisions of the supreme court of California under the same statute, must be the subject of appeal.

The motion is overruled.

The counsel were then heard upon the merits of the appeal.

WOOLFOLK & BULLARD and H. M. PORTER, for appellant.

CHUMASERO & CHADWICK, for respondents.

BLAKE, J. The facts appear in the opinion upon the motion to dismiss this appeal. The question for our consideration is very limited and does not affect the substantial rights of the parties. Did the judge err in refusing to stay the execution until a motion to quash the same could be heard at the next term of the court? This proceeding was in effect an application by the appellant to the judge to postpone the trial or hearing of the motion about five months. The sound discretion of the judge was appealed to. It is the general rule that courts of appellate jurisdiction will not revise the manner in which a judge has exercised a judicial discretion unless a clear abuse of that discretion is shown. We have followed this rule in cases in which the action of the court in granting or refusing a continuance has been examined. *Black v. Appolonio*, 1 Mon. 345; *Wormall v. Reins*, id. 630; *Territory v. Perkins*, ante, 467. These decisions govern the case at bar. There is nothing in the record showing that the judge abused that discretion in the ruling complained of, and the judgment must be affirmed.

Judgment affirmed.

NICHOLS, respondent, v. DOBBINS, appellant.

PLEADING — *complaint for trespass by cattle.* N. sued D. for damages caused by D.'s cattle, which broke and entered N.'s premises while they were roaming at large. The complaint alleged that the premises were inclosed by a good and substantial fence "eight and nine rails high," but did not allege that the fence was lawful. *Held*, that the complaint should not contain a legal conclusion, that the fence was lawful, and that the plaintiff could prove the kind and character of the fence. *Held*, also, that the allegation concerning the roaming of the cattle is immaterial.

SAME—*waiver of uncertainty in name.* The complaint did not state the Christian name of N. D. answered and admitted that N. was in the possession of the premises when the alleged trespass was committed. *Held*, that D waived his right to raise the question in this court that the complaint is uncertain in stating the name of N.

Appeal from Second District, Missoula County.

THE motion for a new trial was overruled by KNOWLES, J.

W. J. McCORMICK and JOHNSTON & TOOLE, for appellant.

The complaint does not state facts sufficient to constitute a cause of action. The initial, not the full name, of plaintiff is stated. *Wiebbold v. Hermann*, *post*, 609.

The complaint claims damages because appellant permitted his cattle to roam at large and break through respondent's fence and injure his crop. Appellant was not guilty of negligence in allowing his cattle to roam at large; this was his right. Appellant is not liable for damages done by cattle while roaming at large. *Smith v. Williams*, *ante*, 195, and cases cited.

Respondent claims damages as a statutory right. His complaint should aver that the crop was inclosed by a lawful fence *Dye v. Dye*, 11 Cal. 163. If not so inclosed respondent cannot recover unless the trespass was willful or wanton. *Larkin v. Taylor*, 5 Kan. 433; *Soper v. Harvard College*, 1 Pick. 177.

Ultimate facts should be stated, so that the court could determine if respondent's fence was lawful. Hilliard's Rem. for Torts, 235, n.: *Drowne v. Stimpson*, 2 Mass. 444. Complaint does not aver a wrongful or unlawful breaking of his fence.

W. J. STEPHENS, for respondent.

There are no exceptions properly saved and no statement of evidence. The material allegation of complaint is that the crop was within the inclosure described. The answer admits this allegation by not denying it. The answer does not deny that any cattle of respondent broke the fence. The actual damages by the cattle cannot be ascertained without a statement of the evidence, which is not in the record.

WADE, C. J. This is an appeal from an order overruling a motion for a new trial. There is only one exception in the record and that was not properly saved. The transcript contains the complaint and a demurrer thereto, which does not appear to have been acted on by the court; the answer; the instructions to which there were no exceptions; the verdict and judgment; the motion for a new trial and order overruling the same, to which the appellant excepted but filed no bill of exceptions. There is no evidence in the record, and the grounds of the motion for a new trial, that "the evidence was insufficient to support the verdict, and excessive damages appearing to have been given under the influence of prejudice," must necessarily fail. And upon the ground "that the verdict is against law," owing to the condition of the record, we can only look into the complaint to ascertain if it contains a cause of action. This may be done at any stage of the case.

The action is trespass, and the respondent alleges that, at and prior to the commencement of the action, he was in the possession of a certain tract of land, upon which certain valuable crops were growing; that the land was inclosed by a good and substantial fence, eight and nine rails high; and that the appellant was the owner of certain cattle, which, being permitted to roam at large, broke the fence of respondent and entered his inclosure and destroyed his crops.

The appellant contends that this complaint contains two distinct trespasses in one count, viz., permitting the cattle to run at large, and breaking and entering the inclosure. The argument overturns the first cause by declaring that appellant's cattle had the right to roam at large, which is probably true. The court is left with the other cause of action, which is undoubtedly good. Immaterial matter in a complaint does not vitiate it, if a good cause of action is alleged.

The next objection is that the complaint does not aver that the land of the respondent was inclosed with a lawful fence. Such an averment would be a mere conclusion of law, and courts are generally asked to cause such averments to be stricken from pleadings, instead of requiring them to be inserted. The averment in the complaint authorizes proof of the kind and character of the

fence which inclosed the land; and whether or not it is lawful is a question of law for the court under the evidence.

The third argument is, that, as the cattle committed this trespass while in the exercise of a lawful right, roaming at large, the breaking of the respondent's inclosure is no trespass. As well might it be said that, because a man has the right to walk the streets in the night season, he could not commit a burglary.

Another objection is that the complaint is uncertain because the Christian name of the respondent does not appear therein. We hold that the appellant waived this objection by answering, and thus recognizing the respondent by the name in which he brings this action. The respondent is further recognized and identified by the admission, in the answer, that he was in the possession of the inclosure described in the complaint at the date of the alleged trespass. It is too late to raise this objection to the complaint after answering, and it cannot be presented for the first time to this court after the verdict and appeal. In the case of *Wiebbold v. Hermann*, *post*, 609, we held that the failure to set forth the Christian name of the plaintiff rendered the complaint uncertain. But this uncertainty must be taken advantage of by demurrer, or "the defendant shall be deemed to have waived the same." Civ. Pr. Act, § 55.

Judgment affirmed.

MILLIGAN, appellant, v. JEFFERSON COUNTY, respondent.

STATUTORY CONSTRUCTION — Revenue Act — taxation of calves. The third section of the Revenue Act, approved January 12, 1872, does not exempt calves from taxation in the Territory, and the fourth section mentions "cows and calves" as property subject to taxation. The fifteenth section says that the tax list shall include "cows and calves." The sixteenth section contains a list of questions, which must be answered under oath by the tax payer, and specifies "heifers and steers between one and two years old," but does not mention calves. The last question requires the party to "enumerate" "any other property than that above mentioned." *Held*, that calves are not included by the question about the "heifers and

steers," and that the list of questions is a form. *Held*, also, that calves are taxable under the Revenue Act, and are embraced by the question as "other property."

Appeal from Third District, Jefferson County.

THE judgment was rendered by WADE, J.

JOHNSTON & TOOLE, for appellant.

Are sucking calves subject to taxation in this Territory? This is the sole question in this case. All property must be assessed in bulk, or by a specific list thereof. Cooley on Taxation, 261, 271, 272, and notes. Our statute requires a list of all taxable property from tax payers, and prescribes the form of the list and the articles it shall contain. Cod. Sts. 604, § 13; 605, §§ 14, 16.

No other property is taxable except what is included in said tax list. *People v. Sneath*, 28 Cal. 615. Revenue laws are construed most strongly against the government. Cooley on Taxation, 201, 202. Sucking calves are not specified in the Revenue Act. The language is "cows and calves," taken together; calves, as defined by the act, are one year old at least. Cod. Sts. 605, §§ 15, 16; *Falkner v. Hunt*, 16 Cal. 171.

The list mentions the grades and kinds of stock which are taxable, and does not include sucking calves. The averment must be uniform. Cod. Sts. 608, § 20. Uniformity can only be secured by a strict compliance with this list.

The last question in the list must be considered in connection with the other sections of the Revenue Act, §§ 1, 4, 5, 10, 13, 14, 15, 20. It means, Have you any other different species or kind of property than that herein referred to and classified by its distinct species? It does not mean to refer to more property of the kinds already specified in the list.

J. G. SPRATT, District Attorney, First District, for respondent.

The Revenue Act makes calves taxable property. Property "of every kind" must be taxed. § 3. "Cows and calves" are specified in the fourth and fifteenth sections. There can be no doubt of the intention of the legislature to make calves taxable. The assessor has no discretionary power, and must assess them.

The last question relates to "any other property," and was intended to embrace calves or any property, subject to taxation and not embraced in the list.

KNOWLES, J. The appellant sets forth in his complaint that the treasurer of Jefferson county made an assessment and returned as taxable property of appellant fifty head of sucking calves against his protest; that said calves were not the subject of taxation under the laws of this Territory; that in payment of such assessment the treasurer seized certain property of appellant and sold it. The respondent demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and the appellant assigns this ruling as error.

There is only one question presented in this case. Are sucking calves the subject of taxation under the Revenue Act? The appellant claims that calves are not taxable under the statute until they are one year old. The Revenue Act, approved January 12, 1872 (Cod. Sts., ch. 85), contains the following provisions: "All property, of every kind and nature in this Territory on the first day of January of each year, or which shall arrive or be found in this Territory before the last day of December, ensuing, shall be subject to taxation except ——." § 3. Calves are not among the exceptions. After the statement of the exceptions the act provides: "All other property, real or personal, within the Territory is subject to taxation in the manner herein directed, and this is intended to embrace ——." In the following list of property is enumerated "cows and calves." § 4. Another section specifies what the tax list shall contain and "cows and calves" are again set forth. § 15. From these sections there can be no doubt that the legislature intended that calves should be taxed.

It is urged that the sixteenth section of the act qualifies the foregoing provisions and excludes calves from taxation until they are one year old. It is said that calves under one year of age are not specified in the list. There is no specification of calves. "Heifers and steers between one and two years old" are specified. Does the term "heifers and steers" include calves? A heifer is

a young cow. Webster's Dict. In defining the word "yearling," Webster uses as an illustration the term "yearling heifer." A heifer is a young cow which has not had a calf. 1 Bouv. L. D., tit. "Heifer." A steer is "especially a castrated taurine male from two to four years old." Webster's Dict. According to Webster, the legislature used a proper phrase in speaking of heifers between one and two years old, and an improper one in referring to steers of that age. Our statute provides that "all words and phrases shall be understood and construed according to the approved and common usage of the language." Cod. Sts. 389, § 1. Taking this as a guide, I am sure that the term "heifer" or "steer" nowhere includes calf. The words describe animals of the bovine species which have advanced to an age beyond that of a calf. When one of these animals has reached the age of one year in this Territory, it is usually called a yearling; and if a more definite description is desired, it is termed a yearling heifer or a yearling steer. This is probably the manner in which our legislative assembly intended to classify cattle of that age, and calves would not properly come under the head of "heifers and steers between one and two years old."

The list set forth in said sixteenth section is a mere form. It was not intended to exempt from taxation all property that was not specifically mentioned in this list. The oath, which the party giving in his property is required to take, shows that this is not the intention: "You do solemnly swear that you will well and truly answer all questions in the following list, and that it embraces all moneys, goods, live stock, credits and all other property of any description whatever, owned or held by you as principal, partner, agent, or representative, as the case may be." § 16. The pronoun "it" refers to the "list." It could not be construed to refer to "answer," because it could not have been contemplated that each answer would embrace "all moneys, goods, live stock, credits," etc., considering that "it" refers to "list" and we find that the party giving in his property must swear that this list embraces all his property. Why should a party be required to make such an affidavit, if it was understood that all his property would be given in if true answers were made to the questions in the list? The only reasonable solution is that a party who has other prop-

erty than that mentioned in the list should give it in. This is the last question in the list: "Have you any other property than that above mentioned? If so, enumerate it." Calves are other property than that any one would be required to return in answer to any other question in the list. They are not exempt from taxation and should be given in by the party answering this question. The term "calf," which is used in said fourth and fifteenth sections, is not limited by the sixteenth section. A calf is the young of the bovine species. It is property which is not exempt from taxation and is subject to taxation if it is found in the Territory between the first day of January and the last day of December. The calves in controversy were so found and were properly listed by the treasurer. The demurrer was therefore sustained.

Judgment affirmed.

MARSH, appellant, v. KINNA, respondent.

ORDER SECURING COSTS INTERMEDIATE. An order of the court requiring a plaintiff to give security for the costs, or justify, is intermediate and can be reviewed on an appeal from the judgment dismissing the action upon the failure of the party to comply with the same.

AFFIDAVIT ASKING SECURITY FOR COSTS. The affidavit of a defendant to the effect that he is acquainted with the financial condition of the plaintiff, and that, to the best of his knowledge and belief, the plaintiff is unable to pay the costs likely to accrue in the action, is sufficient under the five hundred and sixty-second section of the Civil Practice Act.

ORDER REQUIRING SECURITY FOR COSTS. Upon the filing of said affidavit the court made an order that the plaintiff give security for the costs, or justify in a certain amount before the trial. *Held*, that the defendant, under said order and section, could give a proper bond, or justify, or deposit money with the clerk, or prove certain facts and prosecute his action without pre-paying the costs. *Held*, also, that the court properly dismissed the action upon the refusal of the plaintiff, after a reasonable time, to perform any of these acts.

Appeal from Third District, Lewis and Clarke County.

THIS action was dismissed by WADE, J.

SHOBER & LOWRY and JOHNSTON & TOOLE, for appellant.

The affidavit on which the case was dismissed is insufficient. Civ. Pr. Act, § 562. Had the affidavit been sufficient the order was improper. Sts. Ex. Sess. 40, § 1. The order and affidavit may be reviewed on appeal. Civ. Pr. Act, § 377.

W. E. CULLEN, for respondent.

The affidavit was sufficient. If defective, no objection was made in the court below, and the question cannot be raised in this court for the first time. *Morgan v. Hugg*, 5 Cal. 409; *Collier v. Corbett*, 15 id. 183; *McCartney v. Fitz Henry*, 16 id. 184.

BLAKE, J. The respondents filed the following affidavit and motion November 17, 1875, in which one of the respondents deposes "that he is one of the defendants in the above-entitled action; that he is acquainted with the financial condition of the said plaintiffs; and that, to the best of affiant's knowledge and belief, said plaintiffs are unable to pay the costs likely to accrue in the said action; wherefore affiant asks that the same may be dismissed." The court made an order November 19, 1875, that said "plaintiffs give security for costs in the sum of \$300, or justify in said amount before the day of trial." This appeal has been taken from the judgment that was entered November 26, 1875, dismissing the action upon the failure of the parties to give said security, or justify. No exception was saved to these proceedings, but the ruling of the court is an "intermediate order involving the merits and necessarily affecting the judgment," and can be reviewed on this appeal. Civ. Pr. Act, § 377; *Marden v. Wheelock*, 1 Mon. 49; *Mason v. Germaine*, id. 263.

The validity of the order complained of must be determined by a reference to the five hundred and sixty-second section of the Civil Practice Act, which provides that the defendant may file a motion asking the court to dismiss the action, or rule the plaintiff to give security; that the motion shall be accompanied by an affidavit "to the effect that the plaintiff is insolvent, or is not able to pay the costs likely to accrue upon said case;" and that "the court shall dismiss such action," unless the plaintiff justifies, or gives a sufficient bond, or deposits money with the clerk, or

makes the affidavit mentioned in the next section. The section which is referred to has been amended by an act approved April 29, 1873. Sts. Ex. Sess. 40. The amended act provides that any person may prosecute an action who will prove that he has a good cause of action, and that, by reason of misfortune or bodily infirmity, he is unable to pay the costs or give security, and has no property to secure the same. It also provides that the action of the court in granting or refusing permission to prosecute a case without the prepayment of the costs, "shall not be matter upon which error can be assigned."

It is claimed that the affidavit is defective because it does not say that the plaintiffs are insolvent, and the deponent has sworn according to his belief, and does not state the facts on which his belief is based. It appears that the affiant was acquainted with the financial condition of the parties, and that his opinion is derived from his knowledge and belief. The statute requires the affidavit to contain one of two facts — that the plaintiff is insolvent, or that he is not able to pay the costs likely to accrue. A party may not be insolvent and may be unable to pay the costs, and the law recognizes this distinction. The respondent has complied with the statute by stating one of these essential facts in his affidavit, and the court was compelled to make the order relating to the giving of the security by the appellant.

The appellant contends that the order, made November 19, 1875, is illegal because the appellant was commanded to give security for the costs, or justify, when he was entitled under the statute to deposit money with the clerk, or prove the facts specified in the amended act. The order is expressed in general terms and it is not necessary that it should enumerate all the rights of the appellant in the language of the laws. The statute and order must be construed liberally to enable the plaintiff to have his day in court. We think that the appellant could justify to the satisfaction of the court by witnesses, or give a bond to secure the payment of the costs, or deposit money with the clerk, or prove said facts under the order. The appellant does not point to any action of the court by which he has been injured. He did not offer to comply with the order, or make said deposit, or prove said facts, and has not been deprived of his statutory privileges.

It will be observed that the final order of dismissal was entered one week after the order dated November 19, 1875. It does not appear that the appellant asked for further time, or moved to reinstate the case upon the docket, and we are satisfied that he had a reasonable time within which he might have obtained the right to prosecute this action, if desirable. When he failed to perform any of the acts which were necessary, the dismissal of the action followed as an immediate result.

Judgment affirmed.

STAPLETON, appellant, v. PEASE, respondent.

EVIDENCE — *statement of discovery of quartz lode — identity of names and persons.* In this action by S. to recover a quartz lode from P., S. offered in evidence a paper purporting to be the original declaratory statement, signed by the discoverer of the lode and sworn to before W. P., the county recorder. P. called as a witness W. P., who testified that his signature to the jurat of the statement was not genuine. S. then proved that he had sent the original statement to the land office in Helena, Montana, and offered in evidence a certified copy of the statement by the county recorder. S. claimed that he was surprised by the testimony of W. P., and that P. did not prove that the witness, W. P., was the county recorder, W. P. *Held*, that the production of the original statement was required at the trial, and that S. could not offer in evidence a copy thereof. *Held*, also, that the identity of the names of W. P., the witness, and W. P., the county recorder, is *prima facie* evidence of the identity of their persons

Appeal from Second District, Beaverhead County.

THE judgment was entered by KNOWLES, J.

SHARP & NAPTON and A. E. MAYHEW, for appellant.

The declaratory statement is only collateral evidence in ejectment. Parol evidence of its contents or a copy is admissible. 1 Greenl. Ev., §§ 87, 498; Cod. Sts. 401, § 29. The signature of the officer is only collateral to the fact that the party swore to the statement. The so-called copy was offered to prove this fact. 1 Greenl. Ev., § 86, *et seq.*

It was not shown that the statement was not a duplicate. The court could not presume that the William Peck, who swore it was not his signature, was the officer who signed the statement. The main fact is the record of the statement. Sts. 9th Sess. 127. This was proved.

Respondent, by admitting the statement without objection, waived any right to compel appellant to produce the best evidence. Appellant lost control of the statement by sending it to the land office and a copy would be admissible. Appellant established a *prima facie* case by introducing the statement without objection.

The main facts are admitted in the exceptions; that the document was a duplicate so far as the description of the property is concerned; the signature of the discoverer of the property; the certificate of the record; that the discoverer was sworn, but the officer failed to sign both duplicates. The lack of the signature of the officer does not destroy the substantial facts.

CHUMASERO & CHADWICK and C. W. TURNER, for respondent.

Appellant could not recover without proving that the declaratory statement had been made before the proper officer. Sts. Ex. Sess. 83, § 1. Appellant did not show that any statement had been made, but proved that some statement had been sent to Helena, Montana. The paper offered in evidence was not a duplicate. The testimony of Peck showed that his signature was not genuine.

The record offered was secondary evidence, if any thing. No foundation was laid for its introduction. Cod. Sts. 401, § 29. 1 Greenl. Ev., §§ 84-88, and cases cited.

Appellant offered the statement as the original. The recorder testified that his signature was not genuine. When the names are the same, it is presumed that the persons are identical until the contrary is shown, and appellant must show that there are two persons of the same name. 1 Greenl. Ev., § 575; *Thompson v. Manrow*, 1 Cal. 428; *Douglas v. Dakin*, 46 id. 49; *Garwood v. Garwood*, 29 id. 520; *Carleton v. Townsend*, 28 id. 221; *Mott v. Smith*, 16 id. 540, 554; *People v. Smith*, 45 N. Y. 772; *Hatcher v. Rocheleau*, 18 id. 86; *Jackson v. King*, 5 Cow. 239.

WADE, C. J. This is an action by the appellants to recover the possession of a certain quartz lode in the Bryant district, Beaverhead county, known as the Phoenix lode. The respondent claims the same property under the name of the Mark Antony lode.

The statute concerning the location and recording of mining claims on veins or lodes, provides that "any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United States." Sts. Ex. Sess. 83, § 1. The person asserting title under this statute must produce in evidence the original declaratory statement, duly signed and sworn to, or, in case the same be lost or not within his power, the record thereof, or a transcript of such record duly authenticated.

The appellants, to establish their title to the property in question, introduced in evidence, without objection, a paper purporting to be an original declaratory statement, which was signed by the discoverer and sworn to before William Peck, county recorder. They further proved the discovery of a vein of silver with well-defined wall rocks, their possession and ouster by the respondent, and rested. The respondent introduced testimony tending to establish his title to the property, and called William Peck, as a witness, who testified that his signature to the jurat to the declaratory statement was not genuine. It was in evidence that William Peck was the recorder of Beaverhead county at the date of the statement. The appellants then proved that they had sent the original declaratory statement of the Phoenix lode to the land office at Helena, Montana; that they had a correct copy thereof duly certified by the county recorder, and then offered the same in evidence; and that they were taken by surprise by the testimony of Peck. It is stated in the bill of exceptions that the respondent did not prove that William Peck, who testified, was the William Peck who was the county recorder at the time the statement was made.

The court thereupon rendered judgment against the appellants, who prosecute this appeal to reverse the same.

The following facts are conclusively shown: That the declaratory statement, introduced in evidence by the appellants and on which they rest their case, was not an original document; that the original was not lost, and that it was under the control of the appellants. Under this state of facts, no copy, record or transcript thereof, could be received in evidence. The appellants contend that, as the respondent offered no evidence tending to show that the William Peck who testified as to his signature was William Peck, the county recorder, there was no proof that William Peck, the recorder, did not sign the jurat to the declaratory statement. No such proof was necessary. Identity of names is *prima facie* evidence of the identity of persons. 2 Phil. Ev. 606, notes *c, h, e*; 1 Greenl. Ev., § 575; *Thompson v. Manrow*, 1 Cal. 428; *Mott v. Smith*, 16 id. 535; *Carleton v. Townsend*, 28 id. 219; *Garwood v. Garwood*, 29 id. 514; *Douglas v. Dakin*, 46 id. 49; *Hatcher v. Rocheleau*, 18 N. Y. 86; *People v. Smith*, 45 id. 772. The burden of proof was upon the appellants, if they disputed the identity of William Peck, the witness, and William Peck, the recorder, to establish the fact. But after showing, by their own proof, that the original paper was at the land office, and there by their own act, and there being nothing to show their inability to produce it in evidence at any time when required, we cannot see much force in the objection that William Peck, the recorder, was not properly identified.

The purpose for which the original declaratory statement was sent to the land office is not disclosed. No attempt was made to show that it had passed beyond the reach of the appellants, and, for all that appears in the record, it remained there under their absolute control. If the paper was required to remain in the land office for the purpose of procuring a patent, or any other lawful object, and the appellants were unable to produce it, an authenticated transcript of the record from the proper officers of the land office would have been admissible in evidence. No attempt was made to lay this foundation for the introduction of secondary evidence, and the certified transcript of the record was properly excluded.

The appellants declare that they were taken by surprise at the testimony of Peck, but they did not ask for a continuance of the case for this reason. And they were not entitled to a continuance. Having the original document upon which they rested their title under their control, they should not have been surprised when its production was required by the court.

Judgment affirmed.

FIRST NAT. BANK OF HELENA, respondent, v. IRVINE, appellant.

PRACTICE—*form of exceptions — review of evidence.* I. made a motion for a new trial on the ground that the evidence did not justify the findings and decision of the court. The motion was overruled, and the clerk noted the exception of I. to the ruling, but no bill of exceptions was prepared "in the usual form." *Held*, that the action of the clerk did not relieve I. from the duty of preparing a bill of exceptions "in the usual form," and that the evidence cannot be reviewed on this appeal.

SAME—*time for filing statement on appeal.* The statement on this appeal was filed more than twenty days after the entry of the judgment, but within twenty days after the entry of the order overruling the motion for a new trial. I. appealed from the order and judgment. *Held*, that I. waived no rights by his failure to file the statement within twenty days after the entry of the judgment.

Appeal from Second District, Deer Lodge County

THE judgment and order appealed from were entered by KNOWLES, J.

CLAGETT & DIXON and JOHNSTON & TOOLE, for respondent.

SHARP & NAPTON, for appellant.

BLAKE, J. The respondent objects to the right of the appellant to be heard on any errors which do not appear in the judgment roll. The action was tried by the court, without a jury. The appellants filed a motion for a new trial, April 26, 1876, on the ground that the evidence was insufficient to "justify the find-

ings and decision of the court." The motion was overruled and the appellant excepted. The transcript says that "no bill of exceptions was reduced to writing, or to form, and allowed or signed by the court or judge, at the time or during the term at which said case was heard and said motion for a new trial overruled, nor was there any consent of counsel or direction of the judge, by entry on the record or otherwise, that the bill of exceptions might be prepared in vacation or signed *nunc pro tunc*. Upon the argument of the motion it appears that reference was made to the pleadings, evidence, minutes of the court, and all papers that were used in the case. This proceeding was correct under the amendment to the two hundred and thirty-fifth section of the Civil Practice Act. Sts. 8th Sess. 52, § 14. The sixteenth section of this amendment provides that "when a motion for a new trial is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a bill of exceptions must be settled in the usual form, upon which the argument of the appeal must be had. Sts. 8th Sess. 53. The action of the clerk in noting the exception to the order of the court in overruling the motion for a new trial did not relieve the appellant from the duty imposed upon him by said sixteenth section. To secure a hearing upon his appeal from this order, he was required to prepare a bill of exceptions "in the usual form." The transcript shows that no such bill has been settled. The statute has defined only one mode by which we can review the evidence to determine whether or not it supports the findings of the court, on an appeal from the order complained of, and the appellant has not complied with the law. *Allport v. Kelley*, ante, 343; *Harris v. S. F. S. M. Co.*, 41 Cal. 393.

The statement on appeal was filed May 16, 1876, within twenty days after the entry of the order overruling the motion for a new trial, which was made April 28, 1876, but it was not filed within twenty days after the entry of the judgment. The notice of appeal states that the appellant has appealed from the order made April 28, 1876, and from the judgment and decree. It is claimed by the respondent that the appellant waived his right to prepare the statement by his failure to file the same within twenty days after the entry of the judgment. If this appeal had been taken from the judgment alone the position could be maintained. Civ.

Pr. Act, § 372; *Harper v. Minor*, 27 Cal. 107; *Bryan v. Maume*, 28 id. 238; *Campbell v. Jones*, 41 id. 515. But the preceding section of the Civil Practice Act declares that a party who appeals and "wishes a statement of the case to be annexed to the record of the judgment or order, * * * shall, within twenty days after the entry of such judgment or order, prepare such statement." Civ. Pr. Act, § 371. The notice of appeal specifies the order, which is appealed from, and within twenty days after the entry of the same the statement on appeal was filed. The appellant has followed substantially the statute in the preparation of the statement.

On the hearing of the appeal the facts stated in the findings of the court must be regarded as true, and we can review the errors of law which appear on the face of the judgment roll. *Allport v. Kelley*, *supra*. The appellant cannot be heard upon any other questions than the following errors, which are embodied in the assignment; that the court erred in its conclusions of law, and in overruling the motion for a new trial. But the consideration of the last error must be limited to matters of law.

COLLIER v. ERVIN.

NEW TRIAL — *cause remanded for further proceedings.* At the August term, 1875, this court reversed the judgment and remanded the cause for further proceedings. It appeared from the opinion that the court below tried two causes of action upon a wrong theory, and that certain errors must be corrected by the court below by determining the amounts due upon three mortgages and their priorities. *Held*, that the errors arose upon the trial of the cause, and that the effect of the order of this court was to grant a new trial.

APPEAL NOT CONSIDERED. Both parties appealed. C. asked for a new trial, and E. for a modification of the judgment. A new trial was granted on the hearing of C.'s appeal. *Held*, that E.'s appeal would not be considered because a modification of the judgment would be useless.

Appeal from First District, Jefferson County.

BLAKE, J., rendered a judgment upon the facts appearing in a prior judgment in this action. Both parties appealed and the cases were argued together.

SHOBER & LOWRY and SANDERS & CULLEN, for Collier.

CHUMASERO & CHADWICK and M. C. PAGE, for Ervin.

The following opinion was delivered on the appeal of Collier.

KNOWLES, J. This case was tried in February, 1874, and heard on appeal in this court at the August term, 1875. The judgment of the court below was reversed and the cause remanded. The cause came on for hearing in the court below at the October term, 1876, and the court held that, under the opinion of this court, a new trial was not granted and that a decree could be entered upon the facts found and which appeared of record in the first trial. The order of this court was as follows: "The decree is reversed and the cause remanded for further proceedings."

We held in *Woolman v. Garringer*, ante, 405, that an order like this did not of necessity amount to a direction that there should be a new trial, and that the opinion of this court could be referred to in determining what was the intention in making the order. It was also held, that, if the error for which the case was reversed occurred on the trial, this of necessity would involve a new trial; but if the error occurred after the trial, and the court below could take up the case at the point where the error occurred, it should do so, and the order for reversal would not call for a new trial. Did the errors for which the case was reversed occur at the trial, or subsequent to it? If subsequent to the trial, was the record in such a condition that the court below could take up the case at the point where the error occurred?

In determining for what errors the decree was reversed, let us consult the opinion rendered at the time of the reversal. It held that the court below had embraced too much in its decree, — the amount secured by the Rader mortgage, when it found that the mortgage was insufficient in law, and that there were not facts sufficient set forth in the cause of action, that seeks to foreclose the Blacker mortgage, to assess the amount due on the Rader mortgage as an amount due on the Blacker mortgage. The extent to which the amount due on the Rader mortgage was included in the decree was erroneous. When did this error occur? It must have occurred on the trial. It was an error in finding an

amount for which a judgment should be rendered. How could this error be corrected without a new trial and assessing again the amount due on the Blacker mortgage? If a jury had wrongfully included this amount in their verdict, I am sure the error could not be corrected without a new trial, as the amounts due respectively on the Rader, Blacker and Collier mortgages nowhere appear in the findings. The amount is specified *in solido*. There should have been a new trial to remedy this error.

The second error might have been corrected in some particulars without a new trial, namely, that portion holding it was error to include in the decree of sale certain property, not in the Collier mortgage, and direct it to be sold in such a manner that the proceeds of the sale would inure to the satisfaction of the Collier mortgage; and that property not included in the Collier mortgage could not be sold to satisfy it. How is a decree to be drawn to meet the case without ascertaining how much was due respectively on the Collier and Blacker mortgages? The evidence must be again referred to.

It was also held error to fail to determine which of the mortgages was the prior incumbrance. No fact upon this point was found. How was it to be reached? The mortgages, their dates and dates of record must be inspected. Evidence must again be inspected and this would be a new trial. If this fact might be ascertained by an examination of the pleadings, it was not so found. This would be an error occurring at the trial and not subsequent to it.

It was suggested in the opinion that the case had been tried upon a wrong theory, namely: That the first and second causes of action were based upon promissory notes, when in fact they were based upon the amounts which had been paid for Ervin *et al.* on the notes. How was this error to be corrected without a new trial? Considering the order rendered in this case in the light of the opinion upon which it is based, its effect was to grant a new trial and it was error in the court below to refuse one.

In order to correct a misapprehension of the attorneys for both parties, I will say that this court did not affirm the determination of the court below that the Rader mortgage was insufficient in law to entitle Collier to foreclose it. This court was never called

upon to determine this question. It took the record as it appeared. In the record was found a determination that the Rader mortgage was insufficient in law, which was not excepted to by either party. This court treated the case from that standpoint and did not feel that it could recede from it.

The judgment is reversed and the cause remanded for a new trial.

New trial granted.

The following opinion was delivered on the appeal of Ervin.

KNOWLES, J. The foregoing decision makes it unnecessary that we should consider the points presented on this appeal. The relief asked by the appellant is a modification of the judgment in appropriating the proceeds of some of the property in controversy. The judgment has been reversed and the cause remanded for a new trial, and any modification of the same would be useless.

NEY, respondent, v. ORR, appellant.

LIABILITY OF SURETIES UPON A BOND NOT SIGNED BY THE PRINCIPAL. — *estoppel.* N. obtained a judgment in the probate court against K. K appealed and gave a bond, in the body of which his name appeared as the principal and the appellants as the sureties, with the usual condition of a statutory undertaking on appeal. N. recovered judgment against K. in the district court and then commenced this action against the sureties on the bond. At the trial the sureties offered evidence showing that the bond was delivered to the probate judge with directions not to file the same until K. signed it; that the judge promised so to do but filed the bond without K.'s signature; and that the sureties did not know it was filed until the appeal had been determined. The evidence was excluded by the court. *Held*, that the bond is not a statutory undertaking on appeal, and that the sureties are not liable thereon. *Held*, also, that N. had notice of the insufficiency of the bond on its face when it was filed, and that the evidence should have been admitted. *Held*, also, that the sureties are not estopped from denying the validity of the bond.

Appeal from Third District, Meagher County.

THE case was tried by WADE, J., with a jury.

S. ORR, for appellant.

The court erred in excluding the evidence offered by appellant. No bond, showing on its face, or that is proved to have been signed by some parties on condition that others were to sign it before it should be used or delivered, is legal or binding on those signing conditionally. If the bond is in such a condition that a party cannot know from its appearance that it is incomplete, a principal may take advantage of an innocent party. *Nash v. Fugate*, 18 Am. Rep. 640 (24 Gratt. 202); *Wood v. Washburn*, 2 Pick. 24; *Swan v. Stedman*, 4 Metc. 548; *Sweetser v. Hay*, 2 Gray, 49; *Dillon v. Brown*, 11 id. 179; *Sacramento v. Dunlap*, 14 Cal. 421; *Bean v. Parker*, 17 Mass. 591.

CHUMASERO & CHADWICK, for respondent.

No motion for a new trial has been heard, and there is nothing before this court except certain exceptions to the ruling excluding evidence by appellant. The cases cited by appellant are not in point. They do not relate to appeal bonds.

An undertaking on appeal is a voluntary undertaking, not executed under legal compulsion. It differs from official bonds. It is a means of procuring a private benefit in the extension of time of payment. *Forest v. Havens*, 38 N. Y. 469.

An undertaking on appeal is an independent contract on the part of the sureties in which the principal need not unite. Civ. Pr. Act, §§ 381, 412; *Bellinger v. Gardiner*, 12 How. Pr. 381; *Dore v. Covey*, 13 Cal. 409; *Tidball v. Halley*, 48 id. 713; *Dair v. United States*, 16 Wall. 1.

The delivery of the bond to the probate judge did not affect the liability of the sureties. There was already a judgment against the principal. Respondent was not liable for the act of this officer, who was the agent of appellant. Appellant has had the benefit of the bond, and respondent has been delayed in the collection of his debt against Kay.

One co-obligor may deliver a bond to another co-obligor as an escrow, but the delivery of an instrument to an obligee or payee, or the agent of either, is absolute in law. *Deardorff v. Foreman*, 24 Ind. 481; *Webb v. Baird*, 27 id. 368.

WADE, C. J. This action originated in that of respondent against Kay in the probate court of Meagher county. The respondent obtained a judgment and Kay appealed to the district court, where the respondent again recovered a judgment. To procure and perfect this appeal Kay caused to be executed a certain bond signed by the appellants as sureties, on which the respondent instituted this action and recovered a judgment against the sureties, who bring this appeal therefrom. The bond is in the following form :

“ Know all men by these presents that we, Henry Kay, as principal, and Sample Orr and David P. Rankin, as sureties, are held and firmly bound unto William H. Ney in the sum of \$616.20, lawful money of the United States of America, to be paid to the said William H. Ney, his executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly, by these presents. Sealed with our seals and dated this 4th day of December, A. D. 1871.”

Then follows the usual condition in an undertaking for an appeal. The bond was signed by said Orr and Rankin, but was not signed by said Kay. The form of this instrument made it a bond for all purposes, as distinguished from a statutory undertaking, and it was drawn to be signed by Kay, as the principal, and his name appears in the body of the bond. The instrument was not signed by said Kay, and showed upon its face that it was imperfect.

On the trial testimony was introduced by the appellants tending to show that the bond was signed by the sureties and delivered to the probate judge with express directions that the same be not filed until it was signed by said Kay ; that the judge promised to heed these directions, but filed the bond without the signature of Kay ; and that the sureties did not learn this fact until the appeal had been determined. On the motion of the respondent this testimony was withdrawn from the jury as immaterial, and the appellants duly excepted by their bill of exceptions.

Was this testimony properly excluded ? This question can be answered by determining whether the bond is of any validity without the signature of the principal obligor. This bond was

given to appeal a case to a higher court in the place of the statutory undertaking, which would have answered every purpose, but it must be construed like any other bond. The rights of the sureties are the same as if this was a common law or official bond which had not been signed by the principal.

These sureties contracted a conditional obligation only by the instrument they signed. They bound themselves jointly and severally with Kay, their principal, and in no other manner, and entered into no independent undertaking for themselves. They made a joint and several promise with Kay, but no promise without him. They undertook to pay any judgment the district court might render against Kay, he being liable with them upon the bond, if he did not pay it. This appears upon the face of the bond. Without Kay's signature, as the principal obligor, an inspection of the instrument shows it to be incomplete. When this bond was filed and the cause appealed thereby, Ney was charged with notice of this defect. The fact that Kay was liable upon the judgment, after its rendition in the district court, does not change the rights of the sureties. This judgment did not render Kay liable upon the bond with the sureties. If a judgment should be entered against appellants for the amount of the judgment in the district court, and they should be compelled to pay it, their remedy would be an action against Kay to recover the amount so paid. But they took upon themselves no obligation to do any thing of the kind. They promised to pay whatever should be recovered upon the bond against Kay, if he did not pay it, and under such circumstances, the judgment against their principal would belong to them. The sureties enter into the obligation with express reference to their rights and their principal's responsibility.

The authorities seem to uphold these views. In *Sacramento v. Dunlap*, 14 Cal. 421, the defendant was required to give a bond for the faithful performance of official duty. The instrument, on which the suit was brought, was filed and approved as such bond. The court says: "It (the bond) purports to be the joint bond of Dunlap, as principal, and of Gass and Tucker as sureties, but is only signed by the sureties. It bears neither the signature nor the seal of Dunlap, and the question for determination is whether the

intended principal, or the sureties, are bound by it. We are clearly of opinion that they are not. As Dunlap has never put his signature to it, the instrument is not his deed. * * * The liability of the sureties is conditional to that of the principal. They are bound if he is bound, and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of the three. Some one must have written his signature first, but it is to be presumed, upon the understanding, that the others named as obligors would add theirs. Not having done so, it was incomplete and without binding obligation upon either."

The supreme court of Massachusetts in *Bean v. Parker*, 17 Mass. 604, says: "We think it essential to a bail bond that the party arrested should be a principal; it is recited that he is; and the instrument is incomplete and void without his signature. The remedy of the sureties against the principal would wholly fail or be much embarrassed, if such an instrument as this should be held binding." See also *Wood v. Washburn*, 2 Pick. 24; *Sharp v. United States*, 4 Watts, 21; *Fletcher v. Austin*, 11 Vt. 447; *Johnson v. Erskine*, 9 Tex. 1. In *Russell v. Annable*, 109 Mass. 72, the court says: "It was essential to the bond that the principals should be parties to it; it is recited that they are so, and the instrument is incomplete and void without their signatures. * * * The sureties on a bond are not holden, if the instrument is not executed by the person whose name is stated as the principal therein."

It may be considered as settled that a bond perfect on its face and apparently duly executed by all whose names appear thereto, purporting to be signed and delivered, and actually delivered without a stipulation, cannot be avoided by the sureties upon the ground that they signed it on condition that it should not be delivered unless it was executed by other persons who did not execute it—where it appears that the obligee had no notice of such condition, and there was nothing to put him on inquiry about the manner of its execution, and that he had been induced upon the faith of such bond to act to his own prejudice. *Dair v. United States*, 16 Wall. 2; *Nash v. Fugate*, 18 Am. Rep. 640 (24 Gratt.

202); *Tidball v. Halley*, 48 Cal. 610; *Deardorff v. Foresman*, 24 Ind. 481; *Webb v. Baird*, 27 id. 368.

These authorities are not applicable to this case. Here the bond was imperfect on its face, a bond of two sureties without a principal, and the obligee must have had notice thereof. Sufficient appeared upon the face of the bond to put him on inquiry about its execution.

From the opinion delivered in the district court, which is in the transcript, this case seems to have been there tried, as if this bond, having performed the office of appealing the case, must therefore be taken and held a statutory undertaking for that purpose. If this view could be upheld, the decision of the court below would be correct, for the contract of the sureties to a statutory undertaking is an original independent contract, to which the signature of the principal is not essential. *Curtis v. Richards*, 9 Cal. 33. The instrument sued on is a common-law bond and the rights of the parties must be determined accordingly.

The respondent contends that Kay has had the benefit of this bond and secured an appeal thereby, and that therefore the sureties are estopped from denying its validity. If this principle applies to Kay, we fail to see its application to the sureties. The appeal was taken under a bond, which is void on its face, and the respondent might have caused the appeal to be dismissed, but he preferred a new trial in the district court. Therefore, the bond operated as much in his favor as in that of Kay. The appellants stand upon the letter of their bond. Having signed an obligation, void upon its face, and this being the extent of their action in the premises, we cannot see how they are estopped from denying the validity of their bond.

The judgment is reversed.

New trial granted.

STAUBACH, respondent, v. REXFORD, appellant.

PLEADING — *denial of ownership.* Under an answer denying "each and every allegation" in the complaint, which alleged that the plaintiff was the owner of certain personal property, the defendant may prove that he owned the same.

EVIDENCE — *ownership — license to enter inclosed field.* At the trial plaintiff testified that said property belonged to him, and was in his inclosed field when taken wrongfully. Defendant offered evidence to prove that plaintiff agreed to and did sell to him the property, and that under this agreement he entered the field and took the property. The evidence was rejected. *Held*, that the evidence relating to the ownership should have been admitted, and that, under said denial, the evidence relating to the privilege to enter the premises was properly excluded.

Appeal from Third District, Jefferson County.

THIS action was commenced in the probate court and appealed to the district court. It was tried by WADE, J., with a jury.

CHUMASERO & CHADWICK, for appellant.

The evidence offered and excluded was directly upon the issues and competent. *Stoddard v. Onondaga Conference*, 12 Barb. 575; *Prindle v. Caruthers* 15 N. Y. 429; *Robinson v. Frost*, 14 Barb. 537; *Corwin v. Corwin*, 9 id. 219; *Benedict v. Seymour*, 6 How. Pr. 298.

B. T., H. M. and I. B. PORTER, for respondent.

The denial under our system of pleading differs from the general issue under the old system. The evidence was offered to show a license or justification and was inadmissible. This defense was not set up in the answer. 1 Van Santv. Pl. (Moak's ed.) 510, 562; *Haight v. Badgeley*, 15 Barb. 499; *Beaty v. Swarthout*, 32 id. 293; *Piercy v. Sabin*, 10 Cal. 22; *Glazer v. Clift*, id. 303; *Coles v. Soulsby*, 21 id. 47.

BLAKE, J. The respondent alleges in the complaint that he was the owner of certain hay, which was in his inclosed field, and that the appellant unlawfully entered the field and took and converted the hay to his use. The answer denies "each and every

allegation " contained in the complaint. At the trial the respondent testified that the hay belonged to him, and was in his possession in his inclosed field when it was taken wrongfully by the appellant. The appellant offered to prove that the respondent agreed to and did sell the hay to him, and that he entered the premises and took the property under this agreement. The court excluded this testimony, and this ruling is before us for review.

The statute provides that the answer "shall contain a general or specific denial of each allegation of the complaint intended to be controverted by the defendant, and may contain a statement of any matter in avoidance, or a counter-claim constituting a defense." Sts. 8th Sess. 46, § 1. Under the pleadings the respondent was required to prove that he was the owner of the hay. The facts that are necessary to be proved by him to make out his case are put in issue. The evidence tending to establish an agreement under which the property was taken by the appellant from the premises of the respondent, was matter in avoidance in the nature of a license or justification. This defense was not pleaded in the answer, and the testimony was properly excluded. *Haigh v. Badgely*, 15 Barb. 499; *Beaty v. Swarthout*, 32 id. 293; *Coles v. Soulsby*, 21 Cal. 51.

Could the appellant, under his general denial, prove that he was the owner of the hay? The defendant in ejectment, under this denial, may give in evidence title in himself. *Marshall v. Shafter*, 32 Cal. 176; *Stone v. Bumpus*, 40 id. 432. A defendant in replevin, under an answer denying the allegations of the complaint, may prove property in himself, or that plaintiff has no title. *Veny v. Small*, 16 Gray, 121; *Robinson v. Frost*, 14 Barb. 536. In *Hill v. Crompton*, 119 Mass. 381, the court holds that "while the defendants pleaded nothing in avoidance or discharge of the liability * * * but simply negatived the averments of the declaration, they were entitled, by any appropriate evidence, to meet that offered by the plaintiff and thus disprove their liability." Where an action respecting property is sought to be sustained on a general allegation of ownership, this may be put in issue by a denial without setting up in the answer facts going to show that some other person is in the ownership; for the plain-

tiff must prove his allegations, and the defendant, under a denial, may controvert them. 1 Van Santv. Pl. (Moak's ed.) 570.

We think that the court erred in excluding that portion of the testimony, which the appellant sought to introduce, that tended to prove that he was the owner of the hay. This evidence was not upon a matter which must be set up affirmatively in the answer.

Judgment reversed.

PARCHEN, respondent, v. PECK, appellant.

PRACTICE — *waiver of defect of parties by defendant.* A. brought this action against B. as the surviving partner of the firm of B. and C. The firm was composed of B., C. and D., but the answer of B. did not set forth that D. was a partner, or that there was a non-joinder of parties, and judgment was entered against B. alone. *Held*, that B. waived the defect of parties by failing to take advantage of it by demurrer or answer, and that the judgment was properly entered.

EVIDENCE — *authentication of articles of incorporation.* In this action B. claimed that the firm had been incorporated under the laws of the State of Iowa, that required the articles of incorporation to be recorded in the offices of the secretary of State and recorder of deeds of the proper county. The statutes of this Territory do not prescribe the manner in which the articles should be authenticated to entitle them to be offered in evidence. The laws of the United States require a certificate by the governor, a justice, or certain other officers, that the attestation is in due form of law. *Held*, that the articles of incorporation could not be admitted in evidence without the certificate of the attestation by the proper officer, or proof of user.

INSTRUCTIONS — *evidence.* Courts should not state evidence to the jury in the form of an instruction, nor give an instruction when there is no evidence requiring it. Courts determine whether there is any evidence tending to establish a fact, and the jury determine whether the evidence does establish the fact.

ERROR NO INJURY. A judgment will not be reversed when the instructions contain error, if no injury has been done.

Appeal from Third District, Lewis and Clark County.

THIS action was tried by WADE, J., with a jury. The following instructions are referred to in the opinion, and were given on behalf of the plaintiffs and respondents.

2. The first question which, by the pleadings in the case, we are to consider is, as to the character of the North-west Transportation Company, the plaintiffs alleging it to be a copartnership, and defendants averring it to be an incorporation. Ordinarily where two or more men jointly engage in such business as the transportation of merchandise on their joint accounts for a reward, the persons will be held liable for any breach of contract or damages for carelessness in their individual capacity, and as partners, and if this defendant and others so engaged he is liable on his contract unless he shows he has the shield of a corporation.

3. The secure transportation of goods without loss to the shipper, being the ordinary business of transportation companies and within their legitimate pretensions, and this company having in its advertisements made its superior facilities for insurance a method of securing patrons, if its general agent undertook, as part of the contract of transportation, to secure or place insurance for defendants on goods transported over its line, this would bind the company.

4. If you should find this company was a firm, company or corporation, and Peck was one of its members, it need make no difference with you that Coulson or others were also members, if Peck and Durfee were.

5. If the defendants, as alleged, undertook to inform the insurance agents with whom their goods were sought to be insured on the boats on which they were shipped from Sioux City, and this was part of the contract of transportation, and they misinformed such insurance agents so that the insurance was misplaced, and this occurred through the carelessness or neglect of defendants, and the goods were lost, and the insurance, by such misinformation, carelessness or neglect, was lost to plaintiffs, then they would be entitled to recover.

9. A general agent has authority to make any contract within the scope of the business for the doing of which his principal advertises him as general agent, and cannot repudiate liability thereon in any way but by showing such authority had been withdrawn by the principal.

10. Authority of an agent is express or implied. And a general agent has authority in all cases of dealing with third persons

ignorant of his actual instructions, to bind his principal to all acts customary, convenient and necessary for the carrying out the business of the agency.

13. Whenever a general agent, acting within and about the business of his principal intrusted to him, transcends the actual authority conferred, the principal must abide by the act of his agent. His only remedy is against the agent for having transcended his instructions. His remedy is not by repudiating the acts of his general agent.

The following instructions were modified by the court and given on behalf of appellants, and are referred to in the opinion.

2. If the jury find from the evidence that the averment of the making of such contract is alone supported by the evidence of W. S. Paynter, one of the plaintiffs, and that such averment is disproved by the evidence of Sam. De Bow, and they give equal weight and credit to the evidence of the plaintiff Paynter and the said De Bow, then the jury should find for defendant.

3. The jury in examining and giving weight and credit to the evidence of the said De Bow. and the said Paynter, should consider the interests of the parties (that the said Paynter has a direct interest in the result of this said suit, and that the said De Bow testified that he has no interest in said action, which evidence is uncontradicted).

The above clause in the parenthesis was struck out by the court.

4. If the said Sam. De Bow was acting as the agent of said North-west Transportation Company, and no power had been given him to make contracts of insurance, then said company would not be bound by, or held liable upon any contracts to insure made by the said De Bow.

5. Upon this power of said De Bow to insure, if the jury should find from the evidence that there is no evidence tending to show that such power had been conferred upon him, but, on the other hand, it is proven by the evidence of said De Bow, Peck, Durfee and others that no such power was given, then the jury must find for the defendant.

CHUMASERO & CHADWICK, for appellant.

Respondents did not prove their allegation that Durfee and

Peck were partners. They proved that Durfee, Peck and T. B. Coulson composed the firm. This action is against Peck alone. When a suit is brought by or against partners, all of them must be joined in the suit. Barbour on Parties, 523, § 17; Civ. Pr. Act, § 14.

The certificate of incorporation of appellants should have been read in evidence. It was sufficiently certified.

The instructions were erroneous, argumentative and calculated to mislead the jury.

SANDERS & CULLEN, for respondent.

Peck waived defect or misjoinder of parties by not pleading the same. Civ. Pr. Act, § 55. The answer does not plead that Coulson was a partner.

The record of the incorporation of appellants was not properly authenticated. There was no proof that there was any organization under it. U. S. Rev. Sts., § 906. Appellants' objections, based upon insufficiency of the evidence, cannot be considered. The record nowhere says it contains all the evidence.

The instructions were correct and fair.

KNOWLES, J. The respondents brought this action against the appellant for damages in failing to insure certain goods, which were lost on a steamboat, the *Ida Reece*, No. 2. The main issue is this: Did the appellant contract with the respondents to insure their goods? The jury found that he did. We cannot review this matter because a part of the evidence before the jury is not presented in the record — the advertisement of the North-west Transportation Company in the *Helena Herald*, and some letters. There is some evidence in the record tending to establish the contract, and it is well settled that an appellate court will not review the verdict of a jury under these circumstances.

The evidence shows that the North-west Transportation Company was a firm which was organized in 1871, and composed of the appellant, Durfee and Coulson. Durfee has since died. It is claimed that the court erred in proceeding against Peck, and that Coulson should have been joined with him. The respondents allege that Durfee and Peck composed the firm known as the North-west Transportation Company, that Durfee had died and

Peck was the survivor. This was denied, but the appellant did not set forth in his answer that Coulson was a member of the firm, or that there was a non-joinder of parties. Can judgment be entered against Peck under the issues? If a defect or misjoinder of parties appears upon the face of the complaint, the defendant should demur. Civ. Pr. Act, § 50. If it does not so appear, the objection should be taken by the answer. Civ. Pr. Act, § 54. If the objection is not taken by demurrer or answer, "the defendant shall be deemed to have waived the same." Civ. Pr. Act, § 55. These sections have been interpreted in the following cases: *Fosgate v. Herkimer M. Co.*, 12 N. Y. 584; *Zabriskie v. Smith*, 13 N. Y. 336; Voorhies' Code, § 148. According to these authorities, we hold that the appellant waived any objection that Coulson was not a party by his omission to point out the same.

The refusal of the court to admit in evidence the articles of incorporation is assigned as error. The laws of Iowa, under which it is claimed that the North-west Transportation Company was incorporated, provides that a corporation shall be organized by articles of incorporation, which shall be recorded in the offices of the recorder and secretary of State. Iowa Code, 1873, 183. To entitle the records of these articles to be admitted in evidence in this Territory, how should they be authenticated? There are no statutes of this Territory providing in what manner a record of this character should be authenticated for this purpose. Then the laws of the United States upon this subject must be complied with. In addition to the attestation by the recorder of deeds of the county, where the corporation has its principal place of business, and the secretary of State of Iowa, with the seal of said State, there should be to each attestation respectively "a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor, secretary of State, the chancellor or keeper of the great seal of the State, * * * that the said attestation is in due form, and by the proper officers." U. S. Rev. Sts., § 906. No certificate by any of said officers is attached to the certificate or attestation of the said recorder or secretary. The secretary of State did not add any such certificate to his own attestation. The articles of incorporation were properly rejected.

These articles might have been excluded upon another ground: there was no offer to follow them up and prove user, that is, that this corporation actually organized and entered upon the business for which it was incorporated, or that its principal place of business was in the county where the said articles were recorded with the recorder of deeds.

The modifications by the court of the instructions asked by the appellant were proper. The second instruction was modified to prevent the jury from being misled by the first part of it. The modification of the third instruction was, in effect, the erasure of a statement of the evidence, and the legal principle was not changed. A court is not required to state evidence to a jury in the form of an instruction. The fourth instruction was so modified as to present to the jury the fact, whether the appellant by implication had any authority to procure the insurance. The instruction, as asked, might be subject to the interpretation that the plaintiffs must prove that the said De Bow had direct authority to enter into contracts for procuring insurance. The modification was made to present the other proposition — an implied authority to make it. It is evident from the instructions that there was some evidence introduced on the trial which tended to show that the appellant and his partner had held themselves out as procurers of insurance of goods shipped over their line. The said De Bow was the general agent of these parties in New York. The inference was that his agency also extended to the branch of the business of procuring insurance. All the evidence upon this point is not before us. If there was testimony that De Bow had any implied authority, from the fact that he was the general agent of Durfee and Peck, to make contracts for insurance, no instruction should be given which would exclude the same from the jury.

The modification of the fifth instruction may have made it correct, but without the modification the instruction was certainly improper. Whether there is any evidence tending to establish a fact is a question for the court. Whether the evidence does establish a fact is a question for the jury. This instruction is ambiguous. Its effect is, that, if the plaintiffs have introduced no

evidence tending to show that De Bow had authority to contract to procure insurance, and the defendant has assumed to prove the negative, and had proved by certain witnesses that De Bow had no such authority, the jury should find for the defendant. If there was no evidence tending to establish a fact, the court should not submit the question whether there was or not to the jury. Nor should the court allow the jury to determine whether the defendant has assumed the burden of proof and established a negative, which he was not required to do. Owing to the absence of evidence from the record, we cannot decide that the defendant did or did not prove the negative. The giving of the instruction as modified is not an error of which the appellant can complain. If the instruction was proper, the modification did not make it improper.

The appellants saved exceptions to every instruction given on the part of the respondent. Not one authority is cited in support of the allegations of error in these instructions. A brief, which makes the following points, is hardly worthy of serious consideration. "The fifth instruction was erroneous." "The ninth and tenth instructions were not law and were calculated to mislead the jury." "The thirteenth instruction was erroneous and calculated to mislead the jury." Some of the points, in which the error is specified, are like the following: "The second instruction asked for by plaintiff was erroneous. The liability, if any, was a joint liability of the defendants; if the defendants were partners then the liability was not simply individual as the jury were instructed." What kind of a liability is that of a partner if it is not individual? He does not act in a representative capacity and his liability may be several, but it is individual. The objection to the third instruction does not state correctly the instruction but we cannot review it because the advertisement referred to is not a part of the record.

There is evidently a clerical mistake in the fourth instruction as to the word "corporation," but how were the jury misled by it? They did not find that the appellant was a member of a corporation, for all competent evidence to establish this fact had been excluded. If the jury could have found that Peck was a member of a corporation under the evidence, then the instruction

that he was individually liable might be error of which the appellant could complain. It is not every error in an instruction that will reverse a case. The error must work an injury. An erroneous instruction upon an immaterial point, or one not involved in the case, will not usually cause the reversal of a case. It must be shown to us where the error worked an injury, and this instruction could not have been injurious.

It is not necessary to discuss the objections to the remaining instructions. It is sufficient to say that they are not well taken. The appellant complains that certain facts are assumed in the instructions, but he has not made all the evidence a part of the record, and we cannot tell whether or not they are correct. Other objections assume that the instruction is what it is not.

Judgment affirmed.

WILCOX, respondent, v. DEER LODGE COUNTY, appellant.

POWER OF LEGISLATURE TO CREATE COUNTY INDEBTEDNESS FOR ROADS. The legislative assembly enacted a statute, approved February 11, 1876, which authorized and required the commissioners of Deer Lodge county to issue county warrants to certain persons to reimburse them for constructing a wagon road in the county. The road was a public highway on which the people of the county are accustomed to travel. A part of the expense of its construction has been paid by private subscription, but the remainder is unpaid. *Held*, that the road has been constructed for a municipal purpose and is beneficial to the people of the county, and that the statute is upon a rightful subject of legislation.

Appeal from Second District, Deer Lodge County.

THE writ of mandate was issued by KNOWLES, J.

A. E. MAYHEW, District Attorney, Second District, for appellant.

Municipal corporations act in a political character and exercise a part of the sovereignty of the State, and in a private character in which they exercise powers for the benefit of their citizens. Cooley on Taxation, § 482.

The legislature has no power to make a county pay or assume a debt of another. *Hampshire v. Franklin*, 16 Mass. 76; *Richland v. Lawrence*, 12 Ill. 1; Cooley on Taxation, 484 *et seq.* Courts will not enforce such a law, if passed. It is not upon a rightful subject of legislation. Organic Act, § 6.

CLAGETT & DIXON, for respondent.

The legislature has exclusive and unrestrained control over corporations like counties. Laws for the relief of individuals are common, and generally admitted to be within the power of the legislature to enact. Dill. on Mun. Corp., §§ 43, 44; A. and A. on Corp., § 31; *Laramie Co. v. Albany Co.*, 92 S. C. 307; *Blanding v. Burr*, 13 Cal. 350; *People v. Alameda Co.*, 26 id. 641; *N. V. R. R. Co. v. Napa Co.*, 30 id. 435; *People v. San Francisco*, 36 id. 595; *Sinton v. Ashbury*, 41 id. 525; *San Francisco v. Canavan*, 42 id. 541; *Winbigler v. Los Angeles*, 45 id. 36.

WADE, C. J. On February 11, 1876, the legislative assembly enacted the following statute :

“Sec. 1. That the board of county commissioners of Deer Lodge county are hereby authorized and required to issue to the following named persons, their heirs or assigns, warrants on the general fund of said county to reimburse said parties for labor done, materials furnished, and moneys expended in the construction of the wagon road leading from Deer Lodge city to Pioneer city in said county of Deer Lodge, constructed under the supervision of John J. Dounhouer, in such sums as may hereafter be found due them as provided for under section 2 of this act. The names of said parties are: John J. Dounhouer, Jere. B. Wilcox, Charles Bielenberg, G. Higgins, E. Goodnight, John Blackledge, P. Gilfoy, J. Simmitt, W. Brainard, and A. Gavon.

“2. Before any warrants shall be issued by the commissioners of said county under the provisions of this act, the parties named therein, or their heirs or assigns, shall make affidavit before some officer authorized by law to administer oaths, that such labor has been performed, or such materials furnished, or such moneys expended by them in the construction of said road, and that the same has never been paid. Upon the filing of such affidavits with

the clerk of the board of county commissioners, it shall be the duty of the said board of commissioners, at their first regular meeting thereafter, to issue to the party or parties making such affidavit, warrants on the general fund of said county to the amount of their respective claims. *Provided*, that this act shall not be construed to authorize said commissioners to issue warrants to any persons not herein named.

"Sec. 3. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

"Sec. 4. This act shall take effect and be in force from and after its passage." Sts. 9th Sess. 170.

The case was tried upon the following agreed statement of facts: That the foregoing law was duly passed and approved; that the plaintiff is named in said law; that the plaintiff, in 1870, furnished supplies and materials which were used in constructing the road described in said law; that the road was not built, or contracted to be built or constructed by said Deer Lodge county, but was built by private subscription, which proved insufficient to pay for the work; that the road was built on the public domain and has been a public highway since its completion, about 1871 or 1872; that there was due plaintiff, June 23, 1870, a balance for said supplies and materials, \$229.10, which has not been paid; that plaintiff made the proper affidavit respecting the said supplies and materials, and presented his account to the county commissioners in March, 1876, and demanded a warrant therefor; that the commissioners then refused and still refuse to issue any warrants for said account; and that said commissioners "do not dispute the furnishing, by plaintiff, of said supplies or materials for said road, nor the value thereof, nor the non-payment of the same, nor the fact that the plaintiff has complied with said law herein referred to in presenting his account, but contend that" they are "not compelled, legally under said law, to pay said claim, or any part of it, or order the issue of warrants therefor."

The court thereupon ordered that a writ of peremptory mandamus issue to the appellant commanding the board of county commissioners to issue to the respondent a warrant on the general fund of the county for \$229.10.

The facts on which this case was tried present for consideration

the important question respecting the power of the legislature to impose a debt upon a municipal corporation without the consent of its people. The spirit of our institutions and the sources from which we derive political rights seem to forbid the exercise of this authority by the law-making power. But municipal corporations are subordinate parts of the State and invested with limited powers. The legislature in granting such powers does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. In *Laramie County v. Albany County*, 92 S.C. 308, Mr. Justice CLIFFORD says: "Counties, cities and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate, and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the State."

"Trusts of great moment, it must be admitted, are confided to such municipalities; and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature; but it is settled law, that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the constitution otherwise provides, the legislature still has authority to amend the charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic, or unjust, and even abolish the municipality altogether, in the legislative discretion. Cooley on Const. (2d ed.) 192."

Has the legislature the power to create a debt and impose it upon the people of a county without their express or implied con

sent? Debts and obligations depend generally for their validity upon the consent and agreement of the parties, or are implied from facts and circumstances deemed equivalent thereto. When thus contracted, the law determines the rights and liabilities incident thereto. There is another class of demands, both in private and public affairs, which should in good conscience be paid, but the law furnishes no remedy to enforce their payment. In behalf of the last class, the legislature has sometimes interfered to compel municipal corporations to pay demands when they were not legally liable. The moral obligation to pay and the failure of a legal remedy seem to be the foundation for legislative action in such cases. But the State only interferes in favor of an honest demand, which the corporation ought in duty to pay, and assumes that the people consent thereto. To place the demand within the legitimate scope of legislative interposition, it must have arisen in accomplishing some object, beneficial to the people and strictly of a municipal, not private character.

In *Sinton v. Ashbury*, 41 Cal. 530, Mr. Justice CROCKETT says: "But whilst it is conceded in nearly all the cases that a municipal corporation is a subordinate part of the State government, organized for the more convenient administration of the local affairs of a particular district, and deriving its powers wholly from the legislature, to whose general control and supervision it is subject, I am not aware that any case has gone so far as to hold that the legislature may devote the funds of a municipal corporation to purposes confessedly private and having no relation to municipal affairs. But I deem it unnecessary for the purpose of this decision to review the authorities on this point, or to attempt to define with precision the limits of the legislative authority over the property and funds of a municipal corporation. It is established by an overwhelming weight of authority, and, I believe, is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for *municipal purposes*, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand when properly established, which in good conscience it

ought to pay even though there be no legal liability to pay it. *Beals v. Amador Co.*, 35 Cal. 624; *Blanding v. Burr*, 13 id. 343; *People v. San Francisco*, 11 id. 206; *Sharp v. Contra Costa Co.*, 34 id. 284; *People v. McCreery*, id. 432; *People v. Alameda Co.*, 26 id. 641."

In *Blanding v. Burr*, *supra*, 349, Mr. Justice FIELD says: "The question presented is not one of power in the legislature to impose upon the corporation the payment of claims for which no consideration has been had, but of power to provide for claims meritorious in their character, for which an equivalent has been received, and from the payment of which the corporation could only escape upon strict technical grounds. That the legislature can provide for the payment of claims, invalid in the forum of the law, but equitable and just in themselves, would seem unquestionable. It may become, for example, of the highest importance to a municipal corporation that counsel should be employed to defend its rights of property assailed by different parties, but its charter may not confer authority to employ the counsel or to meet his charges. Professional services rendered under such circumstances would not constitute a legal charge upon the corporation, but that it would be competent for the legislature to authorize the payment of the charge, and the imposition of a tax for that purpose, no one will deny."

From these authorities, which seem to be conclusive on the subject, three things must concur in order to make the respondent's claim a proper one for the invocation of legislative aid against the county. First. His money must have been expended for a municipal purpose. Second. Its expenditure must have been beneficial to the people of the county. Third. The demand must be properly established. Does the case presented in the agreed statement of facts come within these requirements?

The public highways of a county are peculiarly within the supervision of the municipal authorities, and moneys expended for their construction are moneys expended for municipal purposes. It appears that the people of Deer Lodge and Pioneer cities, being desirous of facilitating the means of communication between these places, raised by subscription a sum of money to construct the wagon road, which has been mentioned. The road

was built, but the subscription did not cover all the expenses and a portion of the indebtedness remains unpaid. This road, with all others then in existence in the Territory in 1872, was declared a public highway by the legislative assembly. Cod. Sts. 541, § 3. The statement of facts shows that this road is a public highway upon which the people of Deer Lodge county are accustomed to travel. Therefore the county is beneficially interested in the road and the people treat it as a public highway. There arises a moral obligation upon the part of the county to pay for the municipal benefits it has derived and is enjoying from the enterprise and liberality of its citizens. The county has received the benefits of all the subscription money, which was a gift, and the legislative assembly, believing that the county ought to pay the remaining indebtedness contracted in the construction of this road, has rightfully exercised its power in passing the foregoing act providing for such payment.

Judgment affirmed.

TOWNSLEY, appellant, v. HORNBUCKLE, respondent.

WAIVER OF MOTION TO DISMISS APPEAL. The transcript on this appeal was filed at the January term, 1876, and the case was continued at the following August term by a written stipulation, in which counsel continued all cases in which they were interested. The respondent, at the January term, 1877, moved to dismiss the appeal because the notice of appeal was served four days before it was filed. *Held*, that the respondent by his delay waived the right to make the motion.

JUDGMENT — *effect of ruling requiring replication — separate trial.* T. brought this action against four persons to obtain an injunction and recover damages for the diversion of water. H. answered separately and set up title to the water, and the other parties filed a general denial. The court overruled T.'s motion to strike out parts of H.'s answer, and ordered T. to reply thereto, and allowed H. a separate trial. T. refused to offer any evidence when the cause was called for trial, and judgment was entered for H. for his costs. *Held*, that the ruling upon the motion and replication did not injure T., and that the court properly exercised its discretion in granting H. a separate trial.

Appeal from Third District, Jefferson County.

THE judgment was rendered by WADE, J.

CHUMASERO & CHADWICK, for the motion to dismiss the appeal.

JOHNSTON & TOOLE and S. ORR, contra.

BLAKE, J. The respondent has filed a motion to dismiss this appeal on the ground that the court has no jurisdiction. The notice of appeal was filed January 10, 1876, and served January 6, 1876. The transcript was filed January 15, 1876, during the term of this court, commencing January 3, 1876, and the cause was continued. At the August term, 1876, the cause was continued in pursuance of a written stipulation, signed by the attorneys, by which all cases in which they appeared were continued. This motion was filed on the first day of this term.

The respondent relies upon the cases of *Courtright v. Berkins*, ante, 404, and *Aram v. Shallenberger*, 42 Cal. 275. The appellant maintains that the respondent by his laches has waived his right to make this motion, and that it should have been made at the preceding terms before the expiration of the time in which another appeal might be perfected. In the case of *Courtright v. Berkins*, supra, we held that Berkins had not waived his right to make this motion. The court holds, in *Aram v. Shallenberger*, supra, that the supreme court of California has no authority to relieve a party from the consequences of a failure to comply with the statute in relation to the service and filing of notices and undertakings on appeal. It is also said that "there is a clear distinction between an appeal insufficiently taken and one not taken at all." In the case at bar the proper notice of appeal has been filed and served on the respondent, but the service preceded the filing of the notice, and the appeal has been insufficiently taken. If the motion had been made at the said January or August terms, we should have sustained it. If no notice of appeal had been filed or served, the appeal would be considered one which had not been "taken at all," and the respondent could not waive his right to make this motion, or give jurisdiction to this court by his consent.

In *Stevenson v. McNitt*, 27 How. Pr. 335, the court held that a party who allowed two general terms of the supreme court to pass by without taking any action, waived his right to make a motion to dismiss an appeal on the ground that the appeal was brought after the time allowed by law for bringing appeals had expired. We find the following cases in the digest, but cannot consult the reports which are cited. "A failure to make a motion to dismiss an appeal, because the record was not filed within the time prescribed by law, until after the case is submitted on final hearing, must be regarded as a waiver of the right. *Bowler v. Parker*, 3 Bush (Ky.), 166." 1 U. S. Dig. 1st Ser. 335, § 990. "Where an appeal stood on the docket of the superior court for three terms, and at the fourth the appellee moved to dismiss it for irregularity — *Held*, that such objections were waived by the delay. *Johnson v. Murchison*, 1 Wins. (N. C.) 33." *Id.*, § 1,000. In *Tripp v. De Bow*, 5 How. Pr. 117, the court says that the service of the notice of appeal is a jurisdictional question, "and the party has a right to take advantage of it at any time, provided he has not appeared and answered or proceeded in such a manner as to give the court thereby jurisdiction in the case." The respondent appeared in this case by filing the written stipulation for a continuance, and has been dilatory in making this motion, which is therefore overruled.

The case was then submitted on the merits of the appeal.

JOHNSTON & TOOLE and S. ORR, for appellant.

Appellant is entitled to a joint verdict against all the respondents. A recovery of joint damages against part would release the balance. Defendants can demand separate verdicts, which secures their rights as effectually as if they had separate trials. *Winans v. Christy*, 4 Cal. 70; *Ellis v. Jeans*, 7 id. 417.

The new matter in the respondent's answer was no defense. There was nothing requiring a reply by appellant. Judgment was entered against appellant because of his failure to reply to every part of the new matter. This was error.

CHUMASERO & CHADWICK, for respondent.

Appellant has not been injured by the decision of the court upon the motion to strike out. We insist that the matter moved to be stricken out was material and should have been replied to by appellant.

It was the duty of the court to order a separate trial for respondent. *Judson v. Malloy*, 40 Cal. 299. It is a question of discretion. *Sawyer v. Merrill*, 10 Pick. 18; *Dorrell v. Johnson*, 17 id. 267. The supreme court will not interfere if this discretion is not abused. *Clarke v. Gonu*, ante, 538.

BLAKE, J. This action is brought by appellant against four parties to enjoin them from diverting water from certain ditches, and recover damages for the diversion of the same before the filing of the complaint. The respondent filed a separate answer and denied specifically every allegation of the complaint, and set up a title to the use of the water. The other parties answered and denied generally the allegations of the complaint. The court overruled a motion of appellant to strike out parts of the respondent's answer, and required him to reply thereto. The respondent demanded a separate trial, which was granted. The appellant refused to file a replication and the following judgment was entered: That the cause came on for hearing on the day set for its trial upon the complaint and respondent's answer; that appellant was in default for refusing to reply to the new matter contained in the answer; that respondent was ready for trial and appellant failed, neglected and refused to offer any evidence, and that respondent recovered his costs of appellant. The action against the other parties was continued.

The motion to strike out affected parts of the answer, but the whole pleading must be considered in determining its effect. It is not necessary for us to decide whether or not the court erred in requiring the appellant to reply to the new matter in the answer. While error imports injury to the party against whom it is committed, we think that the record shows clearly that the appellant has not been prejudiced by this ruling. If the facts stated in the answer would have been taken as true without a replication, the decision protected the rights of the appellant, who cannot com-

plain of it. If the new matter did not require a replication and the court erred, the judgment was not affected and the appellant was not injured. *Mott v. Reyes*, 45 Cal. 390. It has been held that no injury results when the court permits a plaintiff to reply to the answer which does not require a replication. *Jones v. Jones*, 38 Cal. 584. The respondent denied specifically the allegations of the complaint and a judgment could not be entered for the appellant upon the pleadings. If we concede that the new matter was deemed denied by the statute, the burden of proof was not shifted and the appellant was obliged to establish at the trial every allegation of his complaint. His failure to offer any testimony to support these allegations was followed regularly by a judgment against him for the costs. If the court had made a decree confirming the title of the respondent to the water, the appellant might complain of the ruling, but no affirmative relief of this nature was granted.

Did the court err in allowing the respondent a separate trial? It will be observed that the issues between the appellant and respondent were not the same as those between the appellant and the other parties to the action. The court, in its discretion, might have ordered a separate trial to the respondent upon this ground. *Judson v. Malloy*, 40 Cal. 299. But in actions of this class the defendants are jointly and severally liable for the damages claimed. *Daily v. Redfern*, 1 Mon. 467. In an action of tort against several, the court can exercise its discretion and direct the trial of one of them first. *Sawyer v. Merrill*, 10 Pick. 18; *Dorrell v. Johnson*, 17 id. 267. We are compelled to say that the court did not abuse its discretion in this matter. The cases of *Winans v. Christy*, 4 Cal. 70, and *Ellis v. Jeans*, 7 id. 417, cited by the appellant, and holding that the defendants in ejectment will be concluded by the general verdict, if they do not demand separate verdicts, are not in conflict with these views. The court expresses no opinion respecting the right of the parties to separate trials.

Under the pleadings the judgment for costs could be entered for the respondent.

Judgment affirmed.

HIGGINS, respondent, v. EDWARDS, appellant.

STATUTORY CONSTRUCTION — *interest upon county warrants.* The act approved January 11, 1872, provided that county warrants should not bear interest after its passage. The act approved January 12, 1872, provided that said warrants should bear interest at the rate of ten per cent per annum after they had been presented to the county treasurer and duly indorsed not paid. *Held*, that the first act was repealed by the last, and that the warrants bear interest at said rate.

Appeal from Second District, Missoula County.

THIS action was brought to recover the principal and interest of certain warrants of Missoula county, drawn upon the general fund. The answer denied that Higgins, the owner of the warrants, was entitled to any interest. KNOWLES, J., rendered judgment against the county for the principal and interest claimed in the complaint.

W. J. STEPHENS, for appellant.

Appellant admits the laws are as they appear in the statute. The law prohibiting counties from paying interest on warrants was never a part of the codified statutes of Montana, and never revised or reported upon by the Code commissioners. This is one of the findings of the court below. This law was never repealed or affected by the adoption of the codified statutes. The law allowing interest was a continued statute and not a new enactment, and had its force from February 9, 1865, the date of its approval originally. It was not a new act having force from January 12, 1872, the date of the approval of the codified statutes. The legislature had no reference to the law prohibiting the payment of interest on warrants by the adoption of the codified laws. This law cannot be repealed except by an act which is plain on the subject. Any other construction makes useless the repealing clause in Cod. Sts. 554.

JOHNSTON & TOOLE and W. J. McCORMICK, for respondent.

All the laws in the codified statutes embraced between pages 372 and 554, were enacted January 12, 1872, and all acts in con

flict with them were repealed. The law allowing interest on county warrants is so embraced; the law prohibiting interest is not, and, being in conflict with the other act, is repealed.

The construction by appellant would repeal all laws intended to be enacted, and re-enact all laws intended to be repealed.

WADE, C. J. Do county warrants bear interest? This is the only question in this case.

On January 11, 1872, the following statute was enacted by the legislative assembly: "No county warrants issued after the passage of this act shall bear interest." Cod. Sts. 638, § 1.

On the following day the same assembly enacted this statute: "That all county warrants heretofore drawn, or that may hereafter be drawn, by the proper authorities of any county, shall, after having been presented to the county treasurers of the respective counties of this Territory, and by them indorsed, not paid for want of funds in the treasury, from and after said date of presentation and indorsement, shall draw interest at the rate of ten per cent per annum." Cod. Sts. 480, § 10.

The act approved January 12, 1872, in express terms repealed all acts or parts of acts in conflict therewith, and the statute approved January 11, 1872, was repealed by the statute approved January 12, 1872. Cod. Sts. 554, § 1. The act, approved January 12, 1872, is in force and county warrants draw interest at the foregoing rate, after they have been duly presented for payment and indorsed for non-payment.

Judgment affirmed.

REECE, appellant, v. ROUSH, respondent.

EJECTMENT — *equitable defense.* In an action of ejectment, the defendant may set up an equitable defense, and a prayer in the answer for costs is appropriate relief.

STATUTE OF FRAUDS — *oral agreement relating to sale of real property — resulting trust.* A. owned and possessed real property, which was sold by the sheriff under a judicial decree. Before the sale, A. and B. entered into an oral agreement, under which B. bid off the property and advanced the pur-

chase-money and held the legal title for A. A. secured the payment of the money by certain rents, which have paid the sum advanced by B. A. continued in the peaceable possession of the property about five years, when B. brought this action to recover the possession. *Held*, that the agreement is not within the statute of frauds, and that B. is the trustee of A. *Held*, also, that the trust is created "by act or operation of law." *Held*, also, that a delivery of the property to A. by B., after the sheriff's sale, can be inferred from the facts and acts of the parties.

Appeal from Third District, Lewis and Clarke County.

THE judgment was rendered by WADE, J.

JOHNSTON & TOOLE, for appellant.

Respondents cannot plead an equitable defense in this action unless they put themselves in a position to finally determine the controversy and obtain a decree securing their rights. *Lomme v. Kintzing*, 1 Mon. 290; 1 Van Santv. Pl. (Moak's ed.) 687; *Kennyon v. Quinn*, 41 Cal. 325.

The trust set up in respondents' answer is express, and cannot be proved by oral testimony. It is not a resulting trust, as respondents paid no purchase-money. It is not created by law and saved from the statute of frauds. Cod. Sts. 393, § 6; Browne on Frauds, §§ 79-82; *Pierce v. Colcord*, 113 Mass. 372; Perry on Trusts, §§ 75, 137, 140.

Appellant never delivered possession of the property to respondents, who were in possession at the time of the alleged agreement and remained therein. It is not the agreement but the act of delivering possession that takes a case out of the statute. Appellant was entitled to the rents of property he bought without any agreement with respondents. There was nothing done in part performance of the agreement. The statute of frauds applies to this class of cases. There was no mutuality in the alleged agreement, no consideration for the rents, and the agreement was not to be performed within a year. Cod. Sts. 392, §§ 1, 2, 3; 393, § 12; 1 Pars. on Cont. 455; 1 Sto. Eq. (9th ed.), § 736.

Respondents abandoned their agreement by instituting a suit to set aside the sale to appellant. They cannot ask a court of equity to enforce a specific performance thereof. *Conrad v. Lindley*, 2 Cal. 175.

CHUMASERO & CHADWICK and SANDERS & CULLEN, for respondent.

No prayer for affirmative relief is necessary in the respondents' answer. The facts averred would estop the appellant from the prosecution of the action. *Lestrade v. Barth*, 19 Cal. 670; *Pomerooy on Remedies*, §§ 87-97.

The seventh section of the statute of Charles II, for the prevention of frauds, has not been adopted in this Territory. *Perry on Trusts*, §§ 75-79; *Bispham's Eq.* 71; *Cod. Sts.* 391; *Osterman v. Baldwin*, 6 Wall. 123.

Respondents rely upon a resulting trust, which need not be created, manifested or proved by a written instrument. *Ryan v. Dox*, 34 N. Y. 307; *Astor v. L'Amoureux*, 4 Sandf. 524; *Foote v. Foote*, 58 Barb. 258; *Booth's Appeal*, 35 Conn. 165; *Peabody v. Tarbell*, 2 Cush. 231; *Sandfoss v. Jones*, 35 Cal. 481; *Browne on Frauds*, §§ 83, 84, 481.

The loan of the purchase-money was to be paid by certain rents. This made a mutual contract. Appellant bought the property with this money and there was a resulting trust which can be proved by parol.

Appellant has received the rents and is estopped from saying there was no consideration, or that mutuality is wanting.

If an answer states facts for defense, which entitle defendant to affirmative relief, and parties are in court, the relief prayed for is not the limitation upon the power of the court to grant such relief as the facts warrant. *Bradley v. Aldrich*, 40 N. Y. 504; *Hale v. Omaha N. Bank*, 49 id. 626.

JOHNSTON & TOOLE, for appellant, in reply.

No resulting trust is averred in the respondents' pleadings. They set up an express trust which cannot be proved by oral testimony. No facts sustain the claim of respondents about any trust or agreement. There must be a payment with the money of the *cestui que trust*. In this case the identical fund was coming to appellant. *Roberts v. Ware*, 40 Cal. 634; *Coates v. Woodworth*, 13 Ill. 654; *Reeve v. Strawn*, 14 id. 94. Respondents' credit was not used.

Our statute is as effectual as the seventh section of the statute of Charles II. Cod. Sts. 393, § 6. This case is within the statute. Respondents seek to divest appellant of a legal title by an oral agreement. *Williamson v. Williamson*, 4 Iowa, 279.

The only issue was the right of possession, about which nothing was said in the agreement. Respondents must prove clearly their contract. *Purcell v. Miner*, 4 Wall. 513; *Charpiot v. Sigerson*, 25 Mo. 63. The agreement must be mutual. *Abell v. Calderwood*, 4 Cal. 90; *Doe v. Culverwell*, 35 id. 291.

Respondents did not remain in possession under the agreement and appellant could sue therefor when he saw proper.

There is no prayer for general relief to bring the case within the general rule in equity cases. 1 Van Santv. Pl. (Moak's ed.) 361.

BLAKE, J. The complaint alleges that the appellant is the owner in fee and entitled to the possession of a certain lot of land in Helena, and that the respondents are in the possession of and wrongfully withhold the same. The prayer is for the possession of the property and damages for its wrongful withholding.

The respondents do not deny any of these allegations, except that relating to the wrongful withholding, and say, in their answer, that the lot was sold by the sheriff November 10, 1871, under a decree of the district court against them; that appellant, at the request of the respondents, and as their trustee, agreed to and did purchase the property; that appellant, under this agreement, allowed the respondents to retain the possession of the premises; that appellant held the title in trust for the respondents and agreed to convey the property to them as soon as he received from certain rents the money advanced at the sheriff's sale; and that the rents so received exceeded the sum paid by appellant for the premises. The prayer is for costs. The new matter contained in the answer is denied by appellant in his replication.

The action was tried by the court, without a jury, and judgment for costs was entered for the respondents upon the findings of facts and conclusions of law. The transcript does not contain the evidence. It appears from the findings, which are not excepted to, that the agreement of the parties was not in writing,

and that, aside from the same, the respondents established no right to the property, or its possession; that respondents owned and had possession of the lot November 10, 1871, when it was sold by the sheriff under a decree of the district court; that before said sale the appellant and respondents entered into an oral agreement by which the appellant agreed to bid off said property for the respondents, and advance the money therefor and hold the legal title for the respondents in consideration that the respondents secured the payment of the same by the rents of certain property; that this agreement was executed, and the respondents continued in the possession of the lot; that the respondents were unsuccessful in an action to set aside the sheriff's sale to the appellant; that nothing was said in the agreement about the possession of the property; and that the appellant had a mortgage and mechanic's lien upon the lot.

The appellant claims that the equitable title of the respondents should have been set up in a cross-bill, demanding affirmative relief, and that the respondents should have put themselves in a position in which they could obtain a final decree. A demurrer to the prayer of a pleading will not be entertained by courts. The matters contained in the answer have been properly alleged. *Cadiz v. Majors*, 33 Cal. 288; *McCauley v. Fulton*, 44 id. 362; *Tormey v. True*, 45 id. 105; *Kenyon v. Quinn*, 41 id. 330. The appellant relies upon the last case, in which the court says that a party should have pleaded his equitable title, "and asked the appropriate relief." The main question related to the admission of evidence of such a title under an answer which did not have sufficient averments to uphold it. We think that a judgment for costs might be "appropriate relief." Under the pleadings the respondents might have secured a complete adjudication of their rights, but we are unable to see how the appellant has been injured by their action in demanding less relief than they were entitled to. If there is any error in this matter the appellant cannot complain. It is held in *Lestrade v. Barth*, 19 Cal. 671, that the equitable defense must be of such a character that it may be ripened into "a legal right to the premises, or such as will estop the plaintiff from the prosecution of the action." The

judgment for the respondents for costs would prevent the appellant from prosecuting this action.

The chief question must be considered. Is the oral agreement, on which the title of the respondents is based, within the statute of frauds? The following sections of the act concerning "conveyances and contracts" must be examined. No "trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by deed or conveyance, in writing" * * *. Cod. Sts. 393, § 6. This "section shall not be construed to * * * prevent any trust arising or being extinguished by operation of law." Cod. Sts. 393, § 7. If the appellant is under any obligation to the respondents by virtue of the oral agreement it must be a trust which has been created "by act or operation of law." A trust of this nature can be established by parol testimony. "Express trusts cannot be proved by parol. They must be manifested or proved by some writing, signed by the party to be charged with the trust." Perry on Trusts, § 79; Cod. Sts. 393, § 6.

Do the findings establish an implied or resulting trust? Where the contract to hold land in trust is the means of obtaining the legal title, "the trust is not created by the contract but results or is implied from the fraud." Browne on Frauds, § 84. "If the circumstances are such as to raise a resulting or implied trust upon the conveyance, the person entitled to such beneficial interest has the right, at any time, to declare the trust." Perry on Trusts, § 77. The case of *Ryan v. Dox*, 34 N. Y. 307, is directly in point, and reviews carefully the authorities. The facts are substantially the same as those in the case at bar, and it is not necessary to state them. The court held that the purchaser under a foreclosure sale who undertakes to purchase for the benefit of the mortgagor, and thus acquires the title at a price below its value, will be deemed the trustee of the party for whom he has undertaken the purchase. It is no objection that the agreement by which this purchase was made was not in writing. The law makes him a trustee *ex maleficio*. The statutes of New York contain provisions similar to those of this Territory, which have been cited. The court says: "When one party has executed his

part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse it would be a fraud upon the former to suffer his refusal to work to his prejudice." It is an established rule in equity that a parol agreement, in part performed, is not within the statute of frauds.

The sixth section of the statute of frauds of California is the same as that of this Territory, which has been cited. In the case of *Sandfoss v. Jones*, 35 Cal. 486, the court discusses the legal principles, which are applicable to the facts before us, and Mr. Justice SANDERSON says: "So far as the contract relates to the sale of real estate, it amounts to an agreement on the part of Jones and Blanchard to buy the property at sheriff's sale for the benefit of Bartram, who was the execution debtor, and to advance their own money, if necessary, for that purpose. Whether they paid for the real estate wholly or in part, with Bartram's money, or their own exclusively, is immaterial. In either event their agreement was not within the statute of frauds, and was not, therefore, void because it was not in writing." * * * "If, however, we consider the averments of the complaint in the light which is most favorable to the defendants, we have a verbal agreement on their part with an execution debtor whose land is about to be sold by the sheriff, to purchase it with their own funds and hold it for his benefit. Such an agreement is equivalent to a loan of the money and a taking of the title as security for its repayment; or an agreement by one person to purchase land for the benefit of another under circumstances which would amount to a fraud upon the latter, if the former was allowed to repudiate his promise, and, therefore, not within the statute of frauds."

These doctrines are maintained in the following cases: *Astor v. L'Amoureux*, 4 Sandf. 524; *Foote v. Foote*, 58 Barb. 258; *Pooth's Appeal*, 35 Conn. 165; *Peabody v. Tarbell*, 2 Cush. 226; *McDonough v. O'Niel*, 113 Mass. 92; *Soggins v. Heard*, 31 Miss. 428; *Price v. Reeves*, 38 Cal. 457.

The money which the appellant advanced for the purchase of the property at the sheriff's sale has been repaid by the respondents. The appellant has never interfered with the possession of the respondents, or demanded rent for the same, and the respond-

ents have enjoyed this quiet possession about five years. The rights of the parties cannot be affected by the fact that the appellant did not make a formal delivery of the premises to the respondents. Such a delivery, when the respondents were already in its possession, and have so continued during a long period, might be implied from the circumstances of this case. The appellant invokes the statute of frauds to enable him to obtain the possession of the property after his loan has been paid by the respondents. We cannot allow this statute to be used to promote fraud, and permit the appellant to evade his promise. The appellant must be regarded a trustee for the respondents. This trust has been created "by act or operation of law," and, consequently, the oral evidence to prove the same was admitted rightfully by the court below.

Judgment affirmed.

FISK, respondent, v. CUTHBERT, appellant.

STATUTORY CONSTRUCTION — *printing "at the public expense" brands and marks.* The act relating to brands and marks (Cod. Sts., ch. 64), provides that the general recorder shall have published a list of certain marks and brands, and cause to be printed, "at the public expense," a sufficient number of copies to furnish each county clerk in the Territory with copies for gratuitous distribution. *Held*, that this statute authorizes the general recorder to enter into a contract for the printing of said list at the expense of the Territory.

CASE AFFIRMED. The case of *Langford v. King*, 1 Mon. 38, holding that a citizen of the Territory cannot sue it, affirmed.

STATUTORY CONSTRUCTION — *duty of auditor.* In determining the duty of the Territorial auditor in doubtful cases, courts will consider the financial legislation of the Territory and the practical construction of the same by the public officers.

MANDAMUS TO TERRITORIAL AUDITOR. F. printed copies of said list of marks and brands under a contract with said recorder. The Territorial auditor, after demand, refused to issue a warrant for the payment of said services. F. applied for a writ of mandate, and the answer of the auditor admitted the facts stated in the application, and alleged two reasons for his refusal: that the law did not fix a certain compensation for the services, and that

the auditor had no jurisdiction to determine the value thereof. The court issued the peremptory writ and commanded the auditor to issue the warrant. *Held*, that the writ was properly issued.

PRACTICE—argument of counsel. On the hearing of this appeal the counsel for the auditor, the appellant, submitted a written argument and contended that the auditor had jurisdiction to determine the value of F.'s services. *Held*, that the court will not permit the auditor to controvert his answer, and that the question cannot be raised on this appeal.

Appeal from Third District, Lewis and Clarke County.

THE writ of mandamus was issued by WADE, J.

J. K. TOOLE, District Attorney, Third District, for appellant.

The complaint is fatally defective. It does not allege that appellant refused to audit the account of respondents, or that any demand was made that he should do so.

The auditor is not the auditor of his own account. He cannot issue a warrant unless he is expressly authorized by law. Cod. Sts. 381, §§ 1, 5 ; 478, §§ 9, 10. Appellant had no power to audit or issue the warrant. Respondents' account was a contingent charge, and appellant could issue no warrant until some proper officer or tribunal allowed it. No specific sum is allowed for respondents' services.

Appellant can only be asked to exercise his discretion, if he is required to audit respondents' account. No other officer nor tribunal has any discretion in acting on the account in the first instance.

Appellant has no interest in the amount to be allowed respondents other than that in common with other citizens. Why is he made a party to the suit? It is not the duty of the auditor to issue a warrant after a claim against the Territory has been adjudicated and allowed in the courts. After such a claim has been audited and allowed by some proper tribunal, appellant is expressly prohibited from issuing his warrant. Cod. Sts. 141, § 518 ; 381, § 1 ; 478, §§ 9, 10.

Respondents' claim against the Territory has been lawfully incurred, but appellant, without further legislation, cannot issue his warrant for it. The claim should be reported to the legislature, and paid by an appropriation. Cod. Sts. 564, § 5. The words,

“specially” and “expressly,” used in the statutes, refer to each particular claim for which a warrant is to issue. The words, “at public expense,” do not mean out of the Territorial treasury.

Respondents demanded of appellant a warrant for the amount of their claim, but this is not a demand to audit and settle it.

CHUMASERO & CHADWICK, for respondents.

The demand to audit respondents’ account is included in the demand for a warrant. Appellant refused to do any thing. It is the duty of the Territorial auditor to issue his warrant for the amount due when the law recognizes the claim. The amount of respondents’ claim has never been disputed. The general recorder of marks and brands was required to have the pamphlets printed. Cod. Sts., ch. 64. This statute expressly authorizes the recorder to make the contract for the printing and establish the price.

It was not necessary to define the duty of the appellant in this law, which says that certain work shall be done and must be paid for from the public treasury. Any other construction would render the act nugatory. The words “at public expense” are synonymous with “out of the Territorial treasury.”

BLAKE, J. This is an appeal by the Territorial auditor from the judgment of the court below, granting the application of the respondents for a peremptory writ of mandate, and commanding him to issue a warrant upon the Territorial treasurer for the amount of their account for printing a pamphlet containing a list of brands and marks. The facts stated in the application are not denied in the answer of the appellant. It appears that the general or Territorial recorder of the brands and marks entered into a contract in September, 1875, with the respondents, by which they printed 175 copies of the pamphlet and delivered the same to the proper officer, and that these services were reasonably worth \$225. The respondents demanded of the appellant a warrant on the Territorial treasurer for this sum, March 6, 1876, when their claim for these services were delivered to him. The appellant refused to issue any warrant and alleges in his answer the following reasons therefor: That the law does not fix any certain amount for the payment of respondents, and that the Territorial auditor

has no jurisdiction to determine the value of said services. The appellant admits in his argument that the respondents' claim has been lawfully incurred.

We must examine the following statute: "The general recorder of marks and brands shall once a year have published a list of all brands, or marks and brands, which have not been previously published, and cause to be printed, *at the public expense*, a sufficient number of copies, in pamphlet or other convenient form, to furnish each county clerk in the Territory with twenty-five copies thereof, for gratuitous distribution." Cod. Sts. 564, § 5. The term "public" is applied strictly to that which concerns all the citizens and every member of the State. 1 Greenl. Ev., § 128. It refers to "the whole body politic." 2 Bouv. L. D., tit. "Public." The intention of the legislative assembly respecting certain accounts is declared in plain language. When the Territory is not required to pay the same, we find in the laws the following clauses: "At the expense of the county." Cod. Sts. 438, § 27; 501, § 1. "At (the) expense of the Federal government." Cod. Sts. 652. "At his own expense. Cod. Sts. 553, § 8. The clause, "at the public expense," has the same legal effect as the words "at the expense of the Territory" in the statute providing that the office of the Territorial treasurer shall be furnished with certain articles, and that providing that the reporter shall print and bind certain reports. Cod. Sts. 384, § 16; 637, § 3. The legislative assembly designates the printing required by the Territorial auditor and treasurer for their respective offices, "public printing," and provides for its payment by the Territory. Cod. Sts., ch. 51. The word "Territorial" is used as a synonym for "public" in the following section of the act concerning "common schools:" "All printing or binding required under this act shall be executed in the form and manner and at the prices of other Territorial printing, and shall be paid for in like manner, out of the general fund of the Territory." Cod. Sts. 634, § 62. The word "public" has the same meaning as "Territorial" in the section which authorizes the Territorial auditor to prosecute "delinquent collectors of the Territorial revenue" and "persons being in possession of the public funds, money or property;" Cod. Sts. 381, § 4; and in that which

authorizes this officer to make report "of the public revenue and expenditures of the Territory." Cod. Sts. 382, § 8.

The act "in relation to brands and marks" (Cod. Sts., ch. 64), creates a Territorial office and affects the whole Territory, and the pamphlet referred to has been printed and published for the benefit of the body politic. Therefore, the law provides that what is done for the welfare of all the people shall be paid for by the public or Territorial treasury. The legislative assembly has acted upon a rightful subject of legislation and "expressly" authorized a claim against the Territory. What is the power of the general recorder? In *Randall v. Yuba Co.*, 14 Cal. 219, the supervisors of the county contracted with one party to print the delinquent tax list, and the tax collector, an officer of the county, contracted with another party to do the same work. The statutes of California required the tax collector to complete and publish this list, and collect in addition to the taxes certain sums which are to be paid to the county, "for the cost it may incur for printing the list." The court held that the collector was authorized to make the contract for this printing, and that the county was bound by the reasonable exercise of his agency and must pay the price agreed upon. This case was affirmed in *Keller v. Hyde*, 20 Cal. 593. The court held that the county treasurer could not pay a warrant which had been allowed by the supervisors on a demand for printing the delinquent tax list, under a contract made by the supervisors. Other authorities support the proposition that an officer, who is empowered to publish this list, can make contracts for the performance of the work with any party and fix the price of the same, which must be paid by the county. *Commissioners v. Kierolf*, 14 Ind. 284; *Beal v. Supervisors*, 13 Wis. 500. We are satisfied that the general recorder of marks and brands has been authorized by the statute, *supra*, to do any act necessary to secure the printing of said list of brands and marks at the Territorial expense. He can also fix the price thereof, and his action cannot be controlled by the Territorial auditor, or any other officer. There is no controversy relating to the conduct of the general recorder in making the contract with the respondents, and the Territory is bound by the reasonable exercise of his authority therein. The amount claimed by the respondents is not in

dispute, and it is evident that the Territory owed the same when this proceeding was commenced.

What was the remedy of the respondents? They cannot enforce their claim by an action against the Territory. This doctrine was announced in *Langford v. King*, 1 Mon. 38, and Mr. Justice KNOWLES said: "We hold, therefore, that unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it. There is no law of this Territory or act of congress permitting it. There is, then, no legal power to enforce Territorial contracts. In other words, there is no obligation to Territorial contracts. They rest simply upon the good faith of the Territory." In *Board of Liquidation v. McComb*, 92 S. C. 541, the court says: "A State, without its consent, cannot be sued by an individual."

What was the duty of the appellant under the facts which have been specified? The Territorial auditor "shall audit all claims against the treasury," and make to the legislative assembly "a full detailed statement of all expenditures, claims and demands by him audited and allowed," and "give separately the items and claims of each and all persons in whose favor he has audited any demand, and under what law allowed, and the date of the allowance." Cod. Sts. 381, § 5; 382, § 8. He "shall issue no warrants drawn upon the Territorial treasurer in favor of any person, without express authority of law." Cod. Sts. 381, § 1. He shall issue such warrants "in favor of all persons to whom the legislative assembly of the Territory may direct," and "shall be deemed guilty of a misdemeanor," if he issues a warrant contrary to law. Cod. Sts. 477, § 1; 478, §§ 9, 10.

We are called upon to define the duty of the appellant under the statutes and pleadings. The answer alleges that the appellant has no jurisdiction to determine the amount to which the respondents are entitled. In other words, he asserts that he has no discretion to exercise in ascertaining this amount. This position was not controverted in the court below and the parties and court assumed that it was sound. But the appellant's brief contains authorities which are cited to maintain the proposition that the appellant was empowered to use his discretion in auditing and allowing the claim of the respondents, and that the court could not

govern this discretion by the writ of mandate. These questions cannot be raised by the appellant at this time, and we express no opinion regarding them. The appellant cannot obtain a remedy in this court by upholding legal principles, which are in conflict with his answer and were not presented in the court below. He must confine himself in this court to objections which were "specifically taken at the trial." *Clarke v. Huber*, 25 Cal. 593; *Stoddard v. Treadwell*, 29 id. 282. In *Bradbury v. Cronise*, 46 id. 288, the court held that a certain averment in the complaint must be deemed to have been admitted by the answer, and that "it was not possible for the defendant to controvert" it at the trial, or raise the question on the appeal. A finding by a court or jury, which is inconsistent with the pleadings, must be disregarded. *Tevie v. Hicks*, 41 Cal. 127; *Bradbury v. Cronise*, *supra*.

Another ground of defense is that the statute does not fix the amount which the respondents should receive for their services. There is no foundation to this suggestion. There is no law of the Territory which restricts the right of the auditor to issue warrants for sums that have been specified in the statutes. We might overrule the objection by saying that the amount of the respondents' account is not disputed, and hence it is immaterial. We have also seen that the general recorder of marks and brands has been clothed with ample power to determine the compensation for the respondents' services.

What has been the action of the Territorial auditor in drawing warrants for the payment of claims against the Territory? The practical construction given to an act by the public officers of a State "is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt or where the error is not plain." *Union I. Co. v. Hoge*, 21 How. (U. S.) 66; Sedgw. Stat. & Const. Law (2d ed.), 227. The general understanding of a law, and a constant practice under it for a long period by the officers who were authorized to execute it, which have not been questioned by any suit in the courts, ought to be very strong, if not conclusive evidence of its true meaning and application. *Scanlan v. Childs*, 33 Wis. 663. Where infinite mischief would ensue, if the court, in the construction of a statute, should adopt a different rule from that which has long been established, the construction which would

otherwise be put upon the act will not be enforced; and courts will accept the construction which is universally received and has long been acted on. *Van Loon v. Lyon*, 4 Daly (N. Y.), 149. The contemporaneous construction of a statute by the legislature is of high authority. *Philadelphia R. Co. v. Catawissa R. Co.*, 53 Penn. St. 60. We can refer to the history of the Territory to ascertain the proper interpretation of a law. *Carpenter v. Rodgers*, 1 Mon. 90. An examination of the financial legislation of Montana shows that the office of Territorial auditor has existed since the session of the first legislative assembly in 1864-5. The legislative assembly has rarely passed laws making appropriations of definite sums for specific objects. "By a specific appropriation we understand an act by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular claim or demand." *Stratton v. Green*, 45 Cal. 151. A majority of the warrants which have been drawn upon the Territorial treasurer by the auditor has been issued in the settlement of claims when there was no statute which prescribed the amount that should be paid. This practical construction of the laws by this officer has been acquiesced in and sanctioned by every Territorial officer and the legislative assembly. The authority of the auditor to draw warrants for the payment of claims against the Territory which had their origin in statutes that did not set apart in the treasury "a named sum of money" therefor, has not been questioned until this action was commenced. This officer has drawn many warrants upon the treasury under the following section. The auditor "shall furnish his office with all needful blanks, maps, books, stationery, fuel and cases for books, etc." Cod. Sts. 383, § 10. No law can be cited which declares that these articles shall be furnished at the public or Territorial expense, or fixes the amount that shall be paid for them. Yet the official reports of the auditor contain items showing that warrants have been issued in payment of these articles and some which cannot be designated accurately as "blanks, maps, books, stationery, fuel and cases for books," but might be included by "etc." The law relating to the Territorial treasurer, *supra*, provides that the necessary articles "shall be furnished at the expense of the Territory," and has received the same practical construction by the Territorial officers and been acted upon by the

people and their legislative assemblies. We could refer to other statutes and prove that the auditor has drawn warrants on the Territorial treasurer in payment of claims for articles and labor, when no price was specified. Under the foregoing authorities we must adopt the construction of the laws by the Territorial officers which has been received and acted on since the Territory was organized by congress, and therefore hold that the Territorial auditor can issue his warrant in the settlement of demands against the Territory when no sum of money is stated in the statute.

The appellant contends that he cannot draw a warrant upon the Territorial treasurer unless the law contains the clause, "the auditor is hereby authorized and required to draw his warrant on the Territorial treasurer in favor of — for — dollars," or words having the same meaning. This expression does not appear in the statute relating to marks and brands, and it is insisted that the appellant cannot issue a warrant in favor of the respondents, and has no "express authority of law" to act in this matter. The practical construction of the statutes by the appellant and his predecessors in office is opposed to this argument, but the appellant has not waived his right to be heard thereon. There is no such clause in the above statutes, which provide for the supply of certain articles for the offices of the Territorial auditor and treasurer. The authorities which have been referred to are applicable to this proposition of the appellant, which has never been supported in the courts of this Territory until this action was brought.

The laws which regulate the payment of claims against the Territory are not uniform in their phraseology, but the intention of the legislators is clear and can be executed by the appellant. The section relating to the printing for the superintendent of public instruction, *supra*, provides that it shall be paid for, like "other Territorial printing," "out of the general fund of the Territory." At the time of the passage of this act there were four Territorial officers that required printing to be done for their respective offices, the auditor, treasurer, recorder of marks and brands, and superintendent of public instruction. We know of no statute which requires any part of this printing to be paid for "out of the general fund of the Territory," except that which has been mentioned. The contract for the printing, which was authorized by

law for the auditor and treasurer, was awarded to the lowest bidder, and the auditor was empowered to draw a warrant upon the Territorial treasurer for its payment. Cod. Sts., ch. 51. The printing for the general recorder forms the subject of this action. While our attention has not been called to any statute which creates "the general fund of the Territory," we think that an examination of the following laws will aid us in reaching a correct conclusion. The salaries of the Territorial auditor, treasurer and superintendent of public instruction, "shall be paid quarterly out of the Territorial treasury." Cod. Sts. 383, § 12; 384, § 19; 620, § 4. Subsequently the laws were amended and these salaries were "payable quarterly by warrants drawn on the Territorial treasury." Sts. Ex. Sess. 121, §§ 1, 3. At the following session the statutes were amended so that the salaries of the auditor and treasurer "shall be paid quarterly out of the Territorial treasury by warrant on the general fund." Sts. 8th Sess. 79, §§ 1, 2. The salary of the superintendent of public instruction "shall be paid quarterly out of the Territorial treasury." Sts. 8th Sess. 117, § 4. The traveling expenses of this officer "shall be paid out of any funds in the treasury not otherwise appropriated." Cod. Sts. 620, § 3; Sts. Ex. Sess. 121, § 4; Sts. 8th Sess. 117, § 3. We do not find in these statutes any clause which requires the auditor to issue his warrant for the amounts of said salaries, or expenses, or articles. But the appellant and his predecessors in office have drawn such warrants from the organization of the Territory to the present time, and after the bringing of this action. If the argument of the appellant is sound a large portion of the indebtedness of the Territory has been incurred illegally, and the appellant has been guilty of many misdemeanors in issuing warrants contrary to law. "Infinite mischief" would ensue if we upheld this construction of the statute.

Certain expenses of the superintendent of public instruction "shall be paid out of any fund in the treasury not otherwise appropriated." Cod. Sts. 620, § 5; Sts. 8th Sess. 117, § 5. The auditor is authorized to issue his warrant for the same. When this section was amended the provision relating to the auditor was omitted. Sts. Ex. Sess. 121, § 5. If we accept the proposition of the appellant these expenses would be a proper charge

against the Territory in certain years, but would be without any legal basis in other years.

How shall we construe these and similar laws? The legislative assembly has given the rule of interpretation: "All general provisions, terms, phrases, and expressions used in any statute shall be liberally construed in order that the true intent and meaning of the legislative assembly may be fully carried out." Cod. Sts. 390, § 3. "The form of the warrants of the auditor drawn on the treasurer for the payment of money shall be * * * out of any money in the treasury not otherwise appropriated." Cod. Sts. 477, § 4. What is the "true intent" of the "general provisions" in the statutes which have been referred to? The law which prescribes the form of the warrant is directory. *Young v. Camden Co.*, 19 Mo. 309. A warrant for the payment of a certain sum "out of money in the treasury not otherwise appropriated," has been held to mean that the payment should be made out of money not appropriated to special purposes. *Campbell v. Polk*, 3 Iowa, 467. All the warrants, which are drawn by the Territorial auditor, are of this character and must be paid in the order in which they are presented for payment by the Territorial treasurer when there are funds in the treasury for this purpose. Cod. Sts. 383, § 14; 384, § 15. The technical special appropriation of money which has been made by the legislative assembly is that which requires the Territorial treasurer to set aside certain money in the treasury for the payment of interest and as a "sinking fund." Cod. Sts. 580, § 11; Sts. 8th Sess. 39, § 1; Sts. 9th Sess. 190, § 7. The remainder of the money in the treasury for Territorial purposes is generally applicable to the payment of the warrants which have been issued by the auditor. We have observed that the provisions in the acts of the legislative assembly respecting this fund are not uniform, but the intention is clear and the statutes in this respect are directory. The Territorial auditor is the only officer that is authorized to draw a warrant upon the Territorial treasurer in payment of demands against the Territory, and the warrants are payable out of the same fund. Different words have been used to express only one meaning — the payment by the Territory of claims against it through the proper officers. The general clauses, "at the expense of the Territory," "at the public

expense," "out of the general fund of the Territory," "out of the Territorial treasury," "funds in the treasury not otherwise appropriated," "by warrant on the general fund," "by warrants drawn on the Territorial treasury," etc., which appear in the statutes that have been commented upon, are synonymous and refer to the mode of paying demands against the Territory which have been expressly authorized by the legislative assembly. It is not essential to define in every law which creates a Territorial liability, the duty of the auditor when the intention of the legislators is unmistakable without it.

The printing in controversy has been executed "at the public expense," and is a part of the "other Territorial printing, and shall be paid for in like manner, out of the general fund of the Territory." Cod. Sts. 634, § 62. What is the "manner" of this payment? "The Territorial auditor is authorized to draw his warrant or warrants upon the Territorial treasurer for the payment of" the chief portion of the "other Territorial printing." Cod. Sts. 537, § 5. The appellant has interpreted similar statutes "in like manner." Under what law does the appellant draw warrants for his salary? "The Territorial auditor shall receive a salary * * * to be paid in the same manner as the treasurer is paid." Sts. 8th Sess. 80, § 2. The word "manner" has the same meaning in these statutes. In what "manner" is the treasurer paid? "The Territorial treasurer shall receive a salary * * * which shall be paid quarterly, out of the Territorial treasury, by warrant on the general fund." Sts. 8th Sess. 79, § 1. Under these provisions, the appellant, without any difficulty, discovers "express authority of law" for drawing warrants for his salary. We think that the claim of the respondents should be paid in "the same manner" as the appellant is paid.

It appears that the account of the respondents has been regularly created by a statute of the Territory; that the amount of the same is not disputed; that the appellant has no discretion to exercise in this proceeding; that this account must be paid out of the general fund of the Territory; and that the appellant is the only officer that is authorized to draw a warrant upon this fund. "When a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who

will sustain personal injury by such refusal may have a *mandamus* to compel its performance. *Board of Liquidation v. McComb*, *supra*. The provisions of the Civil Practice Act relating to the writ of mandate are consistent with this doctrine. Civ. Pr. Act, tit. 12, ch. 2. "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined." *Marbury v. Madison*, 1 Cranch, 170. The appellant refused to perform a plain duty and draw a warrant on the Territorial treasurer for the amount of the respondent's account, and the court below properly issued the writ of mandate.

Judgment affirmed.

ERVIN, appellant, v. COLLIER, respondent.

PRACTICE—*presumption about papers used on hearing of motion.* E. gave notice of a motion to modify a judgment by striking therefrom the part taxing against him the costs of a receiver. The motion said it was based upon the papers in a number of cases which were specified. The motion was overruled and E. appealed, but no papers appear in the transcript except those belonging to this action. *Held*, that this court must presume that the papers not in the transcript were not used on the hearing of the motion.

TAXATION OF COSTS OF RECEIVER. E. brought this action to restrain C. from working mining property and obtaining the possession of the same, and recovered a judgment. After a hearing, a receiver was appointed under a written stipulation of the parties, to take charge of the property during the litigation. The costs of the receiver were taxed against the proceeds of the property and E. then made said motion. *Held*, that no facts controlling the sound discretion of the court appear in the record, and that the costs of the receiver should have been taxed against C.

Appeal from First District, Jefferson County.

THE order appealed from was made by SERVIS, J.

CHUMASERO & CHADWICK and M. C. PAGE, for appellant.

The general rule as to costs is that equity follows the law. Appellant recovered judgment in the court below, and the costs of

the receiver should be taxed against the respondent. The order appealed from paid the receiver out of appellants' property. The respondent was in fault and caused the appointment of the receiver and must suffer the consequences. The judgment should not be modified.

The papers used on the hearing of the motion stand in place of a statement, and the record must be presumed to be correct and complete. *Hidden v. Jordan*, 28 Cal. 301; *Smith v. Athern*, 34 id. 506; *Glidden v. Packard*, 28 id. 649.

SHOBER & LOWRY and SANDERS & CULLEN, for respondent.

The order taxing costs of receiver is not appealable. If appealable, judgment will be affirmed if no abuse of discretion is shown. The transcript should show such abuse or error. *Territory v. McClin*, 1 Mon. 394; *Davis v. Germaine*, id. 210; *Anderson v. O'Laughlin*, id. 81; *King v. Sullivan*, id. 282. The transcript is insufficient. *Visher v. Webster*, 13 Cal. 58.

The proof on which the court below acted is not here, and this court cannot say there was error.

This case is not brought within the rule on which rehearings are granted. *Columbia M. Co. v. Holter*, 1 Mon. 429.

There is no bill of exceptions or statement on appeal. Nothing can be presumed outside of the judgment roll. *Viele v. Troy R. R.*, 20 N. Y. 184; *Carman v. Paltz*, 21 id. 547.

WADE, C. J. This case was first tried at the August term, 1875. At the ensuing term in January, 1876, a motion for a rehearing was granted and the case has been argued and submitted at this term. A statement of the facts is necessary to present the questions which are involved. The action is an application for an injunction to stay waste, and a temporary restraining order was issued. Afterward, the appellants applied to the court for the appointment of a receiver, and alleged as a cause therefor, that the respondent continued to work the mining ground in dispute contrary to the restraining order. After testimony had been taken regarding the propriety of appointing a receiver, the parties stipulated that a receiver should be appointed. The receiver made a report of the receipts and expenses of the property and retained

for his services \$812. There were no exceptions to this report. The cause was tried and a decree was rendered in favor of the appellants, giving them the possession of the mining ground and taxing the costs against the respondent, which included the amount of the receiver's services. The respondent made a motion to modify the decree by striking therefrom the part relating to the costs of the receiver. The court sustained the motion, and the appellant excepted and appealed from the decree, as modified, to this court.

The motion to modify the decree says that "this motion is based on the papers filed in this cause, and records and papers in the case of *Barkley v. W. M. Ervin* and *W. H. Metcalf*, and the papers and records in the case of *C. T. Collier v. W. M. Ervin* and *W. H. Metcalf* and *M. C. Page*, and the judgments therein rendered and the affidavits on file."

None of the papers in these cases appear in the transcript, except the papers belonging to this action. The decision at the first hearing of this appeal was rendered upon the presumption that the papers in the other cases named in the motion, were used on the hearing of the motion, and that they controlled the discretion of the court in sustaining the motion. This position is wrong. The presumption is that the papers which are mentioned in the motion and do not appear in the transcript, were not used in the court below in determining the motion. *Hidden v. Jordan*, 28 Cal. 301; *Smith v. Athern*, 34 id. 506.

This is a motion after final judgment. On the appeal from its determination, it is the duty of the appellant to cause the record to contain all the papers used on the trial of the same. *Glidden v. Packard*, 28 Cal. 649. The same rule applies on an appeal from a final judgment, and the statute requires the appellant to perform this duty. Civ. Pr. Act, § 379. We presume that this duty has been performed in this case because the respondent has not made a suggestion that there is a diminution of the record. He can compel the appellants to bring to this court a perfect record, and being satisfied with the record, cannot, upon the argument, claim that some papers are missing.

The action of the court below must be reviewed on the papers in the transcript. This is a case in equity and the taxation of the

costs rests in the sound discretion of the court. In the first decision this principle was announced and this court then held that this discretion is limited. It is a legal, not capricious, discretion. When this discretion is exercised outside of established limits, courts will review the same and decide that there has been an abuse thereof, or error. Under the old chancery practice, the general rule is the same as at law, and the winning party recovers his costs. The rule under our practice should be the same in equity cases.

There are no exceptional facts in this case which require the court, in the exercise of a legal discretion, to tax the costs of the receiver against the party in whose favor all the equities were found. It does not matter how or why the receiver was appointed. He is entitled to his costs, which were taxable in this action. No application was made for his removal and no exception was taken to his report and we presume that he was appointed legally and performed his duty faithfully. His compensation should come from the party whose wrongful acts made his appointment necessary in order to preserve the property during the litigation. The record shows that this party was the respondent, and the court found that the appellants were entitled to the possession of the mine. Therefore the costs of the receiver should have been taxed against the respondent. Under the facts appearing in the record the refusal of the court to tax these costs in favor of the appellants was an arbitrary ruling and not the exercise of a legal discretion.

Judgment reversed.

WIEBBOLD, respondent, v. HERMANN, appellant.

PLEADING — *christian names of parties in complaint.* The respondent, by the name of H. C. Wiebbold, commenced this action to foreclose a mortgage executed by the appellants. The appellants demurred to the complaint on the ground that the christian name of the respondent did not appear therein. The demurrer was overruled, and a judgment was entered for the respondent upon the failure of the appellants to answer. The forty-ninth section of the Civil Practice Act provides that the complaint shall contain "the name of the parties to the action, plaintiff and defendant" *Held*, that H. C. Wiebbold is not a legal name, and that the christian name of said Wiebbold must be stated in the complaint. *Held*, also, that the omission of the respondent to set forth in the complaint his christian name, rendered the pleading defective for uncertainty, and the judgment entered thereon is void.

Appeal from Second District, Deer Lodge County.

KNOWLES, J., overruled the demurrer, and rendered the judgment appealed from.

CLAGETT & DIXON, for appellant.

SHARP & NAPTON, for respondent.

WADE, C. J. This was an action to foreclose a mortgage. The defendants demurred to the complaint upon the ground that it was insufficient and uncertain in this, that the christian name of the plaintiff did not appear in the complaint, and therefore that it did not comply with the requirements of the Practice Act in stating the names of the parties to the action. The demurrer was overruled, and this action of the court is assigned as error. Our statute requires that the complaint shall state the names of the parties, plaintiff and defendant. The object of this requirement is to impart certainty to judgments and other judicial proceedings where rights have been determined and adjudicated by the action. How shall the identity of the parties be established? How shall they be estopped? Certainly not while there is doubt as to their names and identity, or as to whose rights have been concluded by the action. Hence the requirement that the complaint shall contain the names of the parties. What is a name?

In law men are known by their christian or baptismal names, and not by the initial letter thereof. 7 Bac. Abr. 7, title Misnomer: *Keene v. Meade*, 3 Pet. 1; *Gaines v. Stiles*, 14 id. 327; *Grant v. Naylor*, 4 Cranch, 224; *Franklin v. Talmadge*, 5 Johns. 84; *Crafts v. Stiles*, 4 Gray, 194; *Garwood v. Hastings*, 38 Cal. 222.

It is not material how this doctrine became engrafted into the law, or the reasons for it, so long as we find it so thoroughly and conclusively established. That its foundation rests in a religious right or ceremony cannot be doubted. But this consideration is of no moment whatever. The question before us is one of law and not of religion, and though many principles of the law may have had their origin in the religious observances of our ancestors, and though the religious significance of the principle may have entirely passed away and become obsolete, yet the law remains, and, when a long course of decisions has established and defined a principle, we are not at liberty to disregard or impair it.

Pleadings must be made certain and definite. Their object is to define rights and to define and identify the person to whom such rights belong and attach. If a person acquires a right or incurs an obligation in a name not his own, he must help his true name by averment, to the end that there shall be no uncertainty as to the adjudication or who is affected by it. If he fails in this and sues in the wrong name, the judgment is uncertain. Actions should be so commenced and judgments so rendered, that a second suit would not become necessary to determine whose rights were adjudicated by the first action. The designation, H. C. Wiebbold, does not import certainty. In the law, it is not a name. No one would contend that the designation, Wiebbold, alone, unaided by averment, answered the requirements of the statute as to the names of the parties to an action. Its uncertainty would vitiate the complaint. It would not identify the party. A judgment for the plaintiff by such a designation would do him no good. It would be void for uncertainty, as would a judgment for the possession of a parcel of land without any description or boundary. The use of the letters, H. C., does not help the matter. H. C. is not a name; but, assuming that they are the initial letters of the christian name, yet they may represent a hundred dif-

ferent names. *Haines v. Smith*, 43 N. Y. 775; *People v. Ferguson*, 8 Cow. 102. The complaint should state the full christian names of the parties. Moak's Van Santvoord's Pl. 155. The omission of the first names of persons in pleadings, unless excused by averment, makes the pleadings indefinite and uncertain. Voorhies' Code (ed. 1870), 248, and authorities there cited. The original writ and declaration must both set forth accurately the names of both parties. The plaintiff must be described by his christian name and surname. Steph. Pl. 284 5; 1 Ch. Pl. 256, and note, N. Y. Sup. Ct. R.; *Frank v. Levie*, 5 Robt. 599.

These authorities are sufficient to show that the omission of the christian name of the parties in pleadings renders them defective for uncertainty. Who brings the action and against whom? The law permits no uncertainty in this. What has been once adjudicated between the same parties shall not be again litigated. Hence the necessity of identifying the parties. This is not a technicality. It is a rule of certainty. The identity of the plaintiff and defendant lies at the very foundation of certainty and safety in judicial proceedings. A failure in this regard would engender a multiplicity of suits to cure the defect. And there is no excuse for uncertainty in a matter so easily rendered certain. A person having a name by which he is known and identified from every other person coming into court, and asking to have a right adjudicated, has no possible reason for not using the name. If he brings his action upon an instrument wherein he is designated by the initial letters of his name or otherwise, not his true name, he must help his true name by averment and proof. The fact that in several of the States special statutes have been enacted authorizing a person to bring an action by the use of the initial letters of his christian name, when so named in the instrument upon which he sues, and also that within the present century a similar statute has been enacted by the British parliament, adds much force to the conclusion that in the absence of any such statute a party to an action must be designated by the use of his christian name, or, if suing upon an instrument wherein he is designated by initial letters of his christian name, that such name must be aided by averment and proof as to the true name and who is intended thereby.

In the case of *Jones' Estate*, 27 Penn. 336, relied upon by the respondent to show that a judgment rendered against a person as A. Jones was good and valid, and therefore that such a designation in pleading is a sufficient description of a party, is in harmony with the doctrine herein expressed. In that case there was proof to show that by A. Jones, Abel Jones was intended, and by this proof, and not otherwise, was the judgment rendered certain and upheld. The case of *Commonwealth v. Gleason*, 110 Mass. 66, is not in point. In that case there was a motion to quash the indictment because it was indorsed "A. Burbank, foreman," the christian name not being used. Here the person making the indorsement, besides the name used, was further designated as "foreman." The indorsement by the foreman was the material matter, and what else he called himself besides foreman was wholly immaterial so long as the indorsement was shown to be by the foreman. No reason is given for the decision, and the statute of Massachusetts, as to the indorsement of the instrument, is not before us. If the record of the court, as it probably did, disclosed the true name of the foreman, then the indorsement by the initial letters of his first name would have been sufficient. 1 Bish. Cr. Proc., § 139, and cases there cited.

The demurrer to the complaint should have been sustained. The judgment is reversed and cause remanded.

Judgment reversed.

KNOWLES, J., concurred.

BLAKE, J., dissenting. I am compelled to dissent from the judgment entered in this case. I think that the opinion of the court rests upon the assumption of the facts, that the respondent has a christian name, and that the letters H. and C. are the initials of his christian names. These facts do not appear upon the face of the complaint, and the appellants cannot specify by a demurrer these grounds of their objections to the complaint. Civ. Pr. Act, § 50. These objections should have been taken by an answer. Civ. Pr. Act, § 54. This view has been discarded by the court, and I wish to express my opinion upon the merits of the questions which have been raised by the demurrer.

The complaint must contain the names of the parties to the action. I claim that respondent has complied with this provision

of the Civil Practice Act by describing in his complaint the plaintiff and defendants, so that all the parties can be identified. The facts which are stated in the complaint effect this object, which is the result of good pleading. There can be no uncertainty respecting the identity of the respondent, and no other allegation of the name of the respondent can affect the substantial rights of any of the parties. The appellants, by the filing of their demurrer, admit that they borrowed a large sum of money of the respondent, and made and delivered to him their promissory notes and a mortgage upon certain real property, which constitute the subject-matter of this action. It is also admitted that the notes remain unpaid, and the appellants, under their hands and seals, knew and designated the respondent by the name in which he commenced this suit. I am unable to see in what manner the substantial rights of the appellants have been prejudiced by the alleged omission of the respondent to set forth his christian name in the complaint.

I concede that the rules of sound pleading usually require the description of the parties to actions by their proper names when they are known. I am aware of the strictness which has prevailed concerning the matter, before the adoption of a practice act similar to that of this Territory. "The plaintiff must be described by his christian name and surname; and, if either be mistaken or omitted, it is ground for plea in abatement." Steph. Pl. 352; 1 Ch. Pl (9th Am. ed.) 256, n. 1. If either party had a name of dignity, he must be described accordingly. The same reasons required the insertion in the complaint of the christian name of the plaintiff and his "name of dignity." These rules of the common law have been abolished by our Civil Practice Act, which says nothing about the christian names of parties to actions, or their dignities. The following sections establish the principles of interpreting the complaint of the respondent. "In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties." Civ. Pr. Act, § 78. "The courts shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be re-

versed or affected by reason of such error or defect." Civ. Pr. Act, § 79.

In *Nelson v. Highland*, 13 Cal. 74, the complaint averred that "Thomas Nelson and — Doble, whose christian name is unknown," etc., and the defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that there was a defect of parties because the christian name of Doble was not given. The demurrer was sustained, the plaintiffs refused to amend their complaint, and the plaintiffs appealed from the final judgment which was rendered. Mr. Justice BALDWIN delivered the opinion of the court, and said: "We do not think it was a good ground of demurrer that the christian name of one of the plaintiffs does not appear in the record. We cannot judicially know that one of the plaintiffs had either a christian or heathen name, or that it is necessarily untrue that he has forgotten it if he had. Judgment reversed and cause remanded."

In *Commonwealth v. Gleason*, 110 Mass. 66, an indictment was signed, "A true bill, A. Burbank, foreman." The defendant moved to quash the indictment, on the ground that the proper and legal name of the foreman was not signed thereto. The motion was overruled, and the court held that "if we assume that the signature contains only the initial letter of his christian name, it is sufficient."

A consonant may be presumed to be an entire christian name as well as a vowel. *Tweedy v. Jarvis*, 27 Conn. 42. In *Quarles v. Collier*, 3 Strobb. (S. C.) 223, the plaintiff declared upon a promissory note as payable to herself, and her name in the note was expressed by the initials of her two christian names and the whole of her surname. It was held that her name thus written, accompanied by her possession of the note, was *prima facie* evidence of identity.

The argument in support of the opinion is based upon the ground that the complaint is ambiguous and uncertain, but the conclusion is, that the complaint does not state facts sufficient to constitute a cause of action. This objection, if not taken by demurrer or answer, is deemed waived. Civ. Pr. Act, § 55. A complaint, which is ambiguous and uncertain, will uphold a judg-

ment, if it states sufficient facts to constitute a cause of action and the court has jurisdiction. If I understand the opinion, the error or defect complained of must be governed by the seventy-ninth section of the Civil Practice Act, *supra*, and the judgment cannot be reversed or affected by it.

The rule, which has been announced, appears to be in conflict with that held by this court in *Kemp v. McCormick*, 1 Mon. 420. The opinion in this case says: "It is sufficient to describe a party to an action by any known and accepted abbreviation of his christian name, and that the defendant, having signed his name to the note in question with such abbreviation, is now estopped from denying it." The doctrine of estoppel is also applicable to the case at bar. We have seen that the appellants signed the notes and mortgage in which the respondent is described by the same name which appears in the complaint. I do not think that the appellants can now deny that H. C. Wiebbold is the name of the respondent.

NOTE.

The case of *Sands v. Maclay*, *ante*, 35, was reversed by the supreme court of the United States in April, 1877, and the answer was adjudged sufficient to present the issues for trial.

REPORTER.

MEMORANDUM.

On the 6th day of March, 1877, Hon. FRANCIS G. SERVIS died at Canfield, Ohio, having held the office of an Associate Justice of this court from the 21st day of September, 1872, to the 10th day of August, 1875.

INDEX.

ACTION

1. *Action by possessor of water right.* A party who is in the possession of a ditch, and the water incident thereto, has an equitable interest therein, and can maintain an action against trespassers. *Barkley v. Tieleke*, 59.
 2. *Limitation of general and special provisions.* The general law of limitation of actions for the recovery of real estate is limited by special provisions applicable to placer mines and quartz lodes. The specific and not the general law must control such cases. *Davis v. Clark*, 310.
 3. *On undertaking a civil action.* The action on a forfeited undertaking, though given to secure appearance in a criminal case, is itself a civil action on a contract with liquidated damages. *United States v. Ensign*, 396.
 4. *Pledge — settlement — demand.* An action for money had and received will not lie by a pledgor against a pledgee, with power to sell until after settlement, and a demand of payment for balance found due. Where dispute arises as to the amount applicable for interest out of the avails of pledged securities, an action for accounting is the proper remedy. *Stephens v. Hartley*, 504.
 5. *Case affirmed.* The case of *Langford v. King*, 1 Mon. 38, holding that a citizen of the Territory cannot sue it, affirmed. *Fisk v. Cuthbert*, 593.
- Limitation of.* See LIMITATIONS.

See CIVIL ACTION ; INDEMNITY.

ADMINISTRATORS.

Probate courts cannot render judgments against, for waste. The probate courts can make necessary orders for the settlement of the estates of deceased persons, but cannot render judgments against administrators for receiving moneys belonging to estates and failing to account therefor. *Deer Lodge County v. Kohrs*, 66.

ALIENS.

1. *Rights of Chinese under "Burlingame treaty."* The sixth article of the treaty between the United States and the Empire of China, promulgated February 5, 1870 (16 U. S. Sts. 739), does not grant to the Chinese in the United States greater privileges than are guaranteed by the laws of congress to other aliens. *Territory v. Lee*, 124.
2. *Rights of aliens under Organic Act.* The Organic Act of the Territory approved May 26, 1864, does not sanction the principle of the common-law, which prohibits aliens from holding real estate. *Ib.*
3. *Act concerning aliens holding mineral lands adjudged void.* The Territory has no right or title to the unappropriated mineral land within its boundaries. The act of the legislative assembly concerning mines held by aliens, approved January 12, 1872 (ch. 82, Cod. Sts. 593), which provides "for the forfeiture to the Territory of placer mines held by aliens," interferes with

ALIENS — Continued.

the primary disposal of the public domain within the Territory, and is, therefore, inconsistent with the sixth section of said Organic Act, and void. *Ib.*

4. *Right of citizens and aliens to mineral land.* Said act of congress, approved July 26, 1866, gives to citizens, and those who have declared their intention to become citizens, the right to enter upon, explore and possess the mineral lands of the United States, and excludes therefrom the Territory, aliens and all others. *Held*, that this act does not authorize the forfeiture of the title of aliens to said lands. *Held*, also, that aliens can hold and enjoy the possessory title to said lands within the Territory. *Ib.*

AMENDMENT.

To statement on appeal. See PRACTICE, 2.

ANIMALS.

Act to prevent the trespassing of animals upon private property expounded. S. brings this action against W. to recover damages for the destruction of his growing grain by the cattle of W., which broke and entered his farm. The statute (Cod. Sts. 373, § 1) provides that if any cattle "shall break into any ground inclosed by a lawful fence," the owner of the animal "shall be liable to the owner of such inclosed premises for all damages sustained by such trespass." *Held*, that there must be a substantial compliance with the statute; that an immaterial variation in the height of the fence from that of a lawful fence would not defeat the action, and that a lawful fence, or an obstruction of the same character, must surround entirely the ground or premises, as a condition precedent to the right to bring an action for damages. *Smith v. Williams*, 195.

See PLEADING, 28; TAXES.

APPEAL.

1. *Time for taking appeals after judgment and rehearing.* G. commenced an action against R. in a justice's court, and an appeal was taken to the district court, where R. recovered judgment. G. made a motion for a rehearing, which was denied, and perfected this appeal within ninety days after the denial of the motion, but more than ninety days after the rendition of the judgment. The three hundred and sixty-ninth section of the Civil Practice Act provides that "an appeal may be taken * * * from a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment." *Held*, that the motion for a rehearing is not a matter of right, and does not affect the judgment, which is final until reversed. *Held*, also, that this appeal must be dismissed, because the same was not perfected within ninety days after the rendition of the judgment. *Griswold v. Ryan*, 47.
2. *Appeal from probate court proceedings.* An appeal is not allowed from the summary proceedings of the probate courts in determining charges of waste against administrators. *Deer Lodge Co. v. Kohrs*, 86.
3. *Order taxing costs not appealable.* A party cannot appeal to this court from an order of the court below taxing costs. *Rader v. Nottingham*, 157.
4. *Effect of judgments of this court until reversed.* The opinion of this court in affirming the judgment of the court below, in granting a new trial, is the law of the case until it is reversed by a higher tribunal. *Oreighton v. Hershfield*, 169.
5. *Assignment of errors — statement.* A statement on appeal that does not contain an assignment of errors must be disregarded. *Frohner v. Rodgers*, 179.

APPEAL — *Continued.*

6. *Costs on appeal from probate to district courts.* In an action for the claim and delivery of personal property, the party who appeals to the district court from a judgment rendered against him in the probate court, for the wrongful detention of the property, and reduces the amount of the damages more than \$10, is not entitled to his costs on the appeal. *Hibbard v. Tomlinson*, 220.
7. *In criminal causes.* The appellant was indicted at the November term, 1872, and tried and convicted at the June term, 1873; a bill of exceptions was signed, but no notice of appeal was ever given; upon application the judge refused to correct the bill in vacation and within six months after the rendition of the judgment; the bill was corrected at the following term, more than six months after the judgment had been rendered. *Held*, that this court did not have jurisdiction of the case. *Territory v. Fullis*, 236.
8. *In United States courts.* The appellate jurisdiction of the courts of the United States is regulated by the acts of congress. (See cases overruled.) *United States v. McElroy*, 237. (See *post*, pl. 36.)
9. — *laws of Territory.* The Civil Practice Act, which prescribes the mode of appealing to this court, is not applicable to cases arising under the constitution and laws of the United States. *Ib.*
10. *Notice — jurisdiction — no appeal from part of a judgment.* The notice of appeal controls the jurisdiction of the appellate court. The sections of the statute conferring jurisdiction must control that which provides how an appeal shall be taken. An appeal from only a portion of a decree or final judgment is not authorized by statute, and cannot be entertained. The appellate court must have jurisdiction of the whole of a judgment to review any portion thereof; the modification of one portion might require the modification of the whole. *Barkley v. Logan*, 296.
11. *Practice — variance — presumption.* In order that the appellate court may take notice of an alleged variance between the summons and the copy served, the record on appeal should set out such variance, so that the court may determine its materiality, else it will be presumed to have been immaterial and will be disregarded. *Dunscheu v. Higgins*, 302.
12. *Practice — demurrer — sufficiency of facts — relief.* An appellate court may consider the sufficiency of facts in a pleading, though the record shows no exception taken to the overruling of such demurrer. A demurrer is not good which goes to the relief only. *Morse v. Swan*, 306.
13. *Practice — appeal — subsequent order — statute construed.* On an appeal from an order made subsequent to the judgment, the court has power to reverse the judgment. A proper construction of section 378 of the Civil Practice Act gives the court such authority. *Collier v. Field*, 320.
14. *Papers considered on.* This court will not review papers in the transcript, which were not used on the hearing in the court below, or have not been certified properly by the clerk of the district court. *Howard v. Quinn*, 339.
15. *Jurisdiction — appeal from probate court.* The district court cannot acquire jurisdiction of an action that has been appealed from the probate court, unless all the papers belonging thereto and a transcript of all the proceedings in the probate court are transmitted to the clerk of the district court. *Ib.*
16. *From "judgments" and orders — review of evidence.* At the April term, 1875, A. recovered a judgment against K. for \$1, and K. recovered a judgment against A. for the costs. A.'s motion for a new trial was refused May 10, 1875. A. filed his notice of appeal July 5, 1875, and appealed from the "judgments" rendered in the action at said term. A. did not appeal from the order refusing the motion for a new trial. *Held*, that the appeal from the "judgments" does not embrace an appeal from the order refusing the new trial. *Held*, also, that this court cannot review any question of fact when there is no appeal from an order granting or refusing a new trial. *Allport v. Kelley*, 343.

APPEAL — *Continued.*

17. *Appeal from order quashing execution.* An appeal can be taken to this court from an order overruling a motion to quash an execution. *Orr v. Haskell*, 350.
18. *From part of judgment — case affirmed.* The case of *Barkley v. Logan*, ante, 296, holding that an appeal cannot be taken from a part of a judgment, affirmed. *Plaisted v. Nowlan*, 359.
19. *Supreme court — appellate jurisdiction.* The Civil Practice Act has superseded the rules of the high court of chancery in England, and does not allow an appeal from "every actual determination" of the court below. *Ib.*
20. *Cross-appeals — transcript.* Every party to an action can appeal from the judgment, and must prepare his transcript for this court. *Ib.*
21. *Judgment — evidence — jurisdiction — indefiniteness — representations.* On an appeal from a judgment alone, when there was no motion for a new trial, the appellate court cannot review the evidence upon which the court below based its findings. *Vantilburgh v. Black*, 371.
22. *Act restricting appeal void.* The six hundred and seventeenth section of the Civil Practice Act, which provides that the supreme court shall have jurisdiction in civil cases, "where the amount in dispute exceeds \$100," is inconsistent with the ninth section of the Organic Act of the Territory, which allows appeals "in all cases from the final decisions" of the district courts. *Payne v. Davis*, 381.
23. *Statutory construction — appeal.* Statutes should be construed liberally to maintain the right of appeal. *Ib.*
24. *Waiver of irregularities on appeal.* D. recovered a judgment in the probate court against P., who appealed. D. appeared generally at two terms of the district court and made two motions to dismiss the appeal for certain irregularities in the taking of the appeal. The motions were overruled, and D. proceeded voluntarily to a trial upon the merits of the action and P. recovered judgment. *Held*, that D. waived the irregularities in the taking of said appeal. *Ib.*
25. *Appeal by Territory in criminal case.* A demurrer to the indictment in this action was sustained on the ground that the court did not have jurisdiction of the offense, and the Territory appealed. The three hundred and ninety-fifth section of the Criminal Practice Act provides that the Territory can appeal when judgment is rendered for the defendant in quashing or setting aside an indictment. *Held*, that this appeal has been properly taken by the Territory. *Territory v. Flowers*, 392.
26. *Statutory construction — time for appealing and filing transcript in criminal case.* The notice of appeal was filed and served October 10, 1874, and the transcript was filed in this court December 28, 1874. The three hundred and ninety-sixth section of the Criminal Practice Act provides that "the transcript must be filed within thirty days after the appeal is taken." *Held*, that this statute is directory, and that the delay of the Territory in filing the transcript does not authorize this court to dismiss this appeal. *Ib.*
27. *Filing and service of notice.* This court does not have jurisdiction of an appeal in which a copy of the notice was served the day before the notice was filed in the district court. *Courtright v. Berkins*, 404.
28. *Right of — in Territory.* The Territory of Montana is a corporation, entitled to maintain civil suits in its own name, with same right of appeal when aggrieved as any other party. *Territory v. Hilderbrand*, 426.
29. *Practice — remedy for errors in appellate court — immaterial variations disregarded.* Errors in a former decision of the appellate court cannot be reviewed on an appeal from the judgment entered in the court below in pursuance of such decision, but only on motion for a rehearing or appeal to a higher court. The judgment of the court below in decreeing absolute title in the party in whose favor the appellate court directed that a per-

APPEAL — *Continued.*

- petual injunction should issue, is not such error that this court will set aside such judgment. The finding in favor of the perpetual injunction presumes such title. *Barkley v. Tieleke*, 433.
30. *Findings by supreme court.* This court cannot find the facts from the evidence produced at the trial in the court below, and order that the judgment be entered thereon. *Barkley v. Tieleke*, 435.
 31. *Judgment upon the findings — new trial.* When the facts have been found by the court below and are not disturbed, and the conclusions of law are erroneous, this court will not order a new trial, but direct that the proper judgment be entered according to the facts. *Ib.*
 32. *Exceptions to instructions.* Where no exceptions were taken to the instructions of the court on the trial below, and properly saved at the proper time, and in the proper way, they will not be regarded in the appellate court. *McKinney v. Powers*, 466.
 33. *In criminal cases — United States cases.* No appeal lies in criminal cases from an order overruling a motion for a new trial, but only from a judgment. A motion for a new trial must be made before judgment, and if denied the remedy will be by appeal from the judgment. *Quere*, whether the Criminal Practice Act of the Territory applies to cases arising under the United States laws. Appeals are not allowed in criminal cases in the United States courts. *United States v. Smith*, 487.
 34. *Settlement of statement on appeal.* It is the duty of the judge who tried the cause to settle the statement on appeal when the parties disagree. In doing so, he must rely upon his own recollection of what the testimony was, and not allow a new trial out of court to ascertain what transpired in court. *Hale v. Park Ditch Co.*, 498.
 35. *Rule No. 26 — application.* Supreme Court Rule No. 26 does not apply to a case wherein the judge certifies according to his recollection of the testimony, but only in cases where the petition shows that he refused to certify as he remembers it. *Ib.*
 36. *Construction of Organic Act — ninth section — in all cases — "same as in other cases" — different jurisdictions.* The ninth section of the Organic Act of the Territory allows appeals in all cases from the final decision of the district court to the supreme court, under such regulations as may be prescribed by law. Appeals being allowed in cases wherein the district court exercises the jurisdiction of the United States district and circuit courts, "the same as in other cases," this must, of necessity, refer to Territorial cases, and hence the Civil Practice Act applies to every class of cases that may arise under any jurisdiction the court can exercise. *United States v. McElroy*, 494.
 37. *Undertaking on.* The undertaking on appeal must comply substantially with the statute. *Stapleton v. Pease*, 508.
 38. *Excess in penalty.* An undertaking on appeal, which is executed in the penal sum of \$500 when the statute fixes the same at \$300, is valid. *Ib.*
 39. *Order refusing to stay execution appealable.* The judge at chambers made an order in May, 1876, and refused to stay until the next term of the court an execution upon a judgment which had been entered in December, 1874. *Held*, that this is a "special order made after final judgment," and therefore appealable. *Clarke v. Gouu*, 538.
 40. *Review of said order — discretion.* The making of said order is an exercise of judicial discretion, which will not be reversed unless there has been a clear abuse of this discretion. *Ib.*
 41. *Form of exceptions — review of evidence.* I. made a motion for a new trial on the ground that the evidence did not justify the findings and decision of the court. The motion was overruled, and the clerk noted the exception of I. to the ruling, but no bill of exceptions was prepared "in the usual form." *Held*, that the action of the clerk did not relieve I. from the duty of preparing a bill of exceptions "in the usual form," and that

APPEAL—Continued.

the evidence cannot be reviewed on this appeal. *First National Bank of Helena v. Irvine*, 554.

42. *Time for filing statement on appeal.* The statement on this appeal was filed more than twenty days after the entry of the judgment, but within twenty days after the entry of the order overruling the motion for a new trial. I. appealed from the order and judgment. *Held*, that I. waived his rights by his failure to file the statement within twenty days after the entry of the judgment. *Ib.*
43. *Appeal not considered.* Both parties appealed. C. asked for a new trial, and E. for a modification of the judgment. A new trial was granted on the hearing of C.'s appeal. *Held*, that E.'s appeal would not be considered, because a modification of the judgment would be useless. *Collier v. Ervin*, 556.
44. *Waiver of motion to dismiss appeal.* The transcript on this appeal was filed at the January term, 1876, and the case was continued at the following August term by a written stipulation, in which counsel continued all cases in which they were interested. The respondent, at the January term, 1877, moved to dismiss the appeal because the notice of appeal was served four days before it was filed. *Held*, that the respondent by his delay waived the right to make the motion. *Townsley v. Hornbuckle*, 580.
45. *Practice—presumption about papers used on hearing of motion.* E. gave notice of a motion to modify a judgment by striking therefrom the part taxing against him the costs of a receiver. The motion said it was based upon the papers in a number of cases which were specified. The motion was overruled and E. appealed, but no papers appear in the transcript except those belonging to this action. *Held*, that this court must presume that the papers not in the transcript were not used on the hearing of the motion. *Ervin v. Collier*, 605.

See JUDGMENT, 1, 11.

APPEARANCE.

Appearance by demurrer. This action was commenced in the district court of the Territory, and the respondents filed a general demurrer to the complaint of the appellant. *Held*, that the court thereby acquired jurisdiction of the parties. *McKiernan v. King*, 72.

ARBITRATION.

Submission—award—statute requisites. In a submission of a controversy to arbitration under the statute, the law requires that all the arbitrators should meet and act together during the entire investigation, but a majority may decide any question. And where one of the arbitrators was absent during part of the investigation, though he may have authorized one of the other arbitrators to sign his name to the award that they should agree upon, such investigation could not lawfully proceed in his absence. The award was null and void, and no valid judgment could be entered thereon. *Dunphy v. Ford*, 300.

ASSAULT AND BATTERY.

Jurisdiction of offense of—indictment for. See JURISDICTION, 20.

ASSIGNEE.

See BANKRUPTCY.

ASSIGNMENT.

When assignment will not defeat set-off. Though a claim for unliquidated damages is not a proper set-off against a claim founded on contract, a judgment in favor of one party is a proper offset against a judgment for damages subsequently obtained by the judgment debtor, and any assignment of such judgment or portion thereof to a third party, after this equitable right has attached, will not be allowed to defeat the same. *Wells v. Clarkson*, 379.

Of judgment — when will not defeat right of set-off. See SET-OFF.

ATTACHMENT.

1. "All debts due" — judgment — note. The one hundred and forty-first section of the Civil Practice Act, which provides that "all debts due such defendant" may be attached, does not include judgments and promissory notes not due. *Perkins v. Guy*, 15.
2. *Of judgment by creditors.* R. recovered a judgment against P. for \$181, November 1, 1871. Certain creditors of R. sued him on the following day and served upon P. a writ of attachment, and notified P. not to pay the judgment to R. Afterward R. caused an execution to be issued and levied upon the property of P. to satisfy his judgment. The said creditors subsequently obtained judgments against R., and were seeking to enforce their attachments upon said judgment against P., when P. filed a bill of interpleader against R. and the creditors. *Held*, that the creditors of R. could not attach his judgment against P., and that P. could not maintain his action of interpleader. *Ib.*
3. *Demand by officer for redelivery of attached property.* The amendment to the one hundred and thirty-seventh section of the Civil Practice Act, approved January 15, 1869, prescribes the following conditions of an undertaking for the release of attached property by the officer, which "the sheriff shall require:" "That, in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment." *Held*, that the officer to whom the undertaking is given is the proper person to make the demand for the redelivery of the property. *Driggs v. Harrington*, 30.
4. *Undertaking — liability of sureties — useless demand.* The sureties upon an undertaking which has been executed to the sheriff in pursuance of the said amendment are not released from their liability by the failure of the officer or any party to make a demand upon the defendants in the attachment suit for the redelivery of the property, if the acts of said defendants have rendered useless such a demand. *Ib.*
5. *Case stated when demand is excused.* In an action brought against the sureties upon a statutory undertaking for the redelivery of attached property, no demand is required for the redelivery of the property which has been released when the property has been removed from the Territory by the defendant in the attachment suit, and said defendant is insolvent and has left the Territory, and has no place of residence or business therein, and the sureties have been notified that the judgment which was obtained in the attachment suit remains unpaid. *Ib.*
6. *Undertaking for return of attached property — tender of bulky goods — waiver of tender — place of delivery.* G. attached 600 yards of carpet, fastened to the floor of A.'s hotel, as the property of A. B. sued the officer to recover the carpet, and gave him an undertaking executed by W. for its return and the payment of any damages, "if return thereof be adjudged." The property was then delivered to B. The officer recovered judgment against B., and W. immediately served on G. and the officer written notices that the carpet would be delivered to them at the hotel, and requested them to go there and receive it. G. and

ATTACHMENT — *Continued.*

the officer refused to receive the property. *Held*, that the carpet is a bulky article which could be delivered at a convenient place designated by the parties entitled to it. *Held*, also, that W. and the other persons, who were required to tender the carpet, could select a suitable place for its delivery upon the failure of G. or the officer to designate the same, and the refusal of G. and the officer to receive the property at the place so selected was adjudged in this action a legal return thereof. *Held*, also, that the allegation of the tender of the carpet to G. by W. is established by testimony showing that G. refused to receive it under the foregoing facts. *Gans v. Woolfolk*, 458.

7. *Evidence — proof of negative averment — satisfaction of undertaking — value of goods.* G. brought this action upon said undertaking, and alleged in the complaint that "no return of the property has been had." *Held*, that the burden of proof rests upon G. to establish this negative averment. *Held*, also, that the condition of said undertaking would be satisfied by said tender of the carpet to G. and the officer, and the payment of the judgment recovered by the officer against B. *Held*, also, that testimony that the carpet is worthless, or has depreciated in value, is not competent. *Ib.*

ATTORNEYS AND COUNSEL.

1. *Right of prisoner to counsel.* The 6th article of the amendments to the constitution of the United States has abrogated the rule of the common law by which a prisoner was not entitled to appear by counsel. *Johnston v. Lewis and Clarke County*, 159.
2. *Compensation of attorney appointed by courts.* An attorney who has been appointed by the district court to defend an indigent prisoner charged with the commission of a felony, is required to perform this duty; but he cannot recover compensation for his services from the county in which the trial occurs. *Ib.*
3. The probate judge cannot act as attorney in his own court. *Smith v. Lovell*, 332.
4. *Taking of exceptions — waiver of statute.* The appellant did not save properly any exceptions to the instructions of the court, but during the trial the attorneys stipulated that "the said exceptions may be had, used and made available on appeal as if so regularly and properly taken." *Held*, that this practice is improper, and the authority of attorneys to make this agreement is doubted. *Daniels v. Andes Ins. Co.*, 500.

See DISTRICT ATTORNEY.

ATTORNEY'S FEES.

See INJUNCTION.

AUDITOR.

1. *Mandamus to Territorial auditor.* F. printed copies of said list of marks and brands under a contract with said recorder. The Territorial auditor, after demand, refused to issue a warrant for the payment of said services. F. applied for a writ of mandate, and the answer of the auditor admitted the facts stated in the application, and alleged two reasons for his refusal: that the law did not fix a certain compensation for the services, and that the auditor had no jurisdiction to determine the value thereof. The court issued the peremptory writ and commanded the auditor to issue the warrant. *Held*, that the writ was properly issued. *Fisk v. Cuthbert*, 593.
2. *Duty of auditor.* In determining the duty of the Territorial auditor in doubtful cases, courts will consider the financial legislation of the Territory and the practical construction of the same by the public officers. *Ib.*

AUDITOR — Continued.

3. *Practice — argument of counsel.* On the hearing of this appeal the counsel for the auditor, the appellant, submitted a written argument and contended that the auditor had jurisdiction to determine the value of F.'s services. *Held*, that the court will not permit the auditor to controvert his answer, and that the question cannot be raised on this appeal. *Ib.*

AUTHENTICATION.

Of documents from other States. In this action B claimed that the firm had been incorporated under the laws of the State of Iowa, that required the articles of incorporation to be recorded in the offices of the secretary of State and recorder of deeds of the proper county. The statutes of this Territory do not prescribe the manner in which the articles should be authenticated to entitle them to be offered in evidence. The laws of the United States require a certificate by the governor, a justice, or certain other officers, that the attestation is in due form of law. *Held*, that the articles of incorporation could not be admitted in evidence without the certificate of the attestation by the proper officer, or proof of user. *Parchen v. Peck*, 567.

AWARD.

See ARBITRATION.

BANKRUPTCY.

1. *Jurisdiction of bankruptcy matters.* The act of congress, establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, does not confer upon the district and circuit courts of the United States exclusive jurisdiction in all proceedings in bankruptcy. *McKiernan v. King*, 72.
2. *Suit by assignee.* The district courts of the Territory have jurisdiction to hear and determine actions brought by the assignee of a bankrupt to recover the possession or value of property, from one who has received the same in violation of said act. *Ib.*
3. *Pleading.* An allegation that a mortgage is void under the bankrupt law is not sufficiently explicit without setting out the clause of the law under which the claim is made and the necessary facts to justify the introduction of evidence. *Smith v. Auerbach*, 348.

BOND.

Liability of sureties upon a bond not signed by the principal — estoppel. N. obtained a judgment in the probate court against K. K. appealed and gave a bond, in the body of which his name appeared as the principal and the appellants as the sureties, with the usual condition of a statutory undertaking on appeal. N. recovered judgment against K. in the district court and then commenced this action against the sureties on the bond. At the trial the sureties offered evidence showing that the bond was delivered to the probate judge with directions not to file the same until K. signed it; that the judge promised so to do but filed the bond without K.'s signature; and that the sureties did not know it was filed until the appeal had been determined. The evidence was excluded by the court. *Held*, that the bond is not a statutory undertaking on appeal, and that the sureties are not liable thereon. *Held*, also, that N. had notice of the insufficiency of the bond on its face when it was filed, and that the evidence should have been admitted. *Held*, also, that the sureties are not estopped from denying the validity of the bond. *Ney v. Orr*, 559.

See OFFICIAL BOND.

CARRIER.

1. *Of passengers — negligence — evidence — declarations of driver of coach about accident.* R., a passenger for hire, sued G., a carrier of passengers, to recover damages for injuries caused by the overturning of G.'s sleigh. At the trial, R. offered in evidence the following statements of G.'s driver, which were made immediately after the accident and while he was in charge of the sleigh: "He could have avoided the overturning of the sleigh if he had been paying the slightest attention. It was his carelessness and there was no necessity for it." *Held*, that the statements were not within the scope of the driver's authority, and were not admissible against G. *Ryan v. Gilmer*, 517.
2. *Proof of negligence.* It appeared at the trial that G.'s driver had complete control of the sleigh, and the horses were traveling about six miles per hour over a good level road, when the sleigh turned suddenly on one side and threw R. from his seat and thereby inflicted a personal injury. R. could not prove the cause of the accident, and did not contribute thereto, and was nonsuited. *Held*, that the proof of the occurrence of the accident and infliction of the injury established a *prima facie* case of negligence against G., and should have been submitted to the jury. *Ib.*
3. *Contract of.* In the absence of a special contract, common carriers of passengers are required to carry passengers as safely as human foresight and reasonable care will permit. *Ib.*

CASES AFFIRMED, OVERRULED OR CRITICISED.

- The case of *Barkley v. Logan*, *ante*, 296, holding that an appeal cannot be taken from a part of a judgment, affirmed. *Plaisted v. Nowlan*, 359.
- Campbell v. Metcalf*, 1 Mon. 381, affirmed. *Aliport v. Kelley*, 343.
- The case of *Collier v. Field*, *ante*, 205, is affirmed on rehearing. *Collier v. Field*, 320.
- The case of *Creighton v. Hershfield*, 1 Mon. 639, holding that the Civil Practice Act of Montana did not apply to equity cases, overruled. That decision was based on the case of *Dunphy v. Kleinschmidt*, 11 Wall. 614, which was reversed in the case of *Hornbuckle v. Toombs*, 18 id. 648, and *Hershfield v. Griffith*, *id.* 657. *Creighton v. Hershfield*, 386.
- Gallagher v. Basey*, 1 Mon. 457, affirmed. *United States v. Ensign*, 396.
- The case of *Griswold v. Boley*, 1 Mon. 545, holding that the property of a married woman is freed from the debts of her husband, when her list of the same has been recorded according to law, affirmed. *Boley v. Griswold*, 447. Also, *Vantilburgh v. Hamilton*, 413.
- The case of *Isaacs v. McAndrew*, 1 Mon. 437, holding that claims for labor do not bear interest, unless there has been unreasonable and vexatious delay, affirmed. *Ruff v. Rader*, 211.
- The case of *Langjord v. King*, 1 Mon. 38, holding that a citizen of the Territory cannot sue it, affirmed. *Fisk v. Cuthbert*, 593.
- The case of *Lomme v. Kintzing*, 1 Mon. 290, holding that a party may move for judgment when the answer raises no material issue, affirmed. *Sands v. Maclay*, 35.
- The case of *Ming v. Truett*, 1 Mon. 322, holding that the statutes do not confer judicial powers upon the trustee of a town site in awarding deeds, affirmed. *Edwards v. Tracy*, 49. See also, 413.
- The decisions of the New York courts upon the practice under the Code of that State are conflicting, and entitled to slight weight in interpreting the Civil Practice Act of this Territory. *Daniels v. Andes Ins. Co.*, 78.
- The case of *People v. Pacheco*, 29 Cal. 210, holding that a proceeding in mandamus must be prosecuted in the name of the real party in interest, and that it could not be prosecuted in the name of the State, doubted. *Chumasero v. Potts*, 242.
- The case of *Rader v. Nottingham*, *ante*, 157, holding that no appeal lies from

CASES AFFIRMED, OVERRULED OR CRITICISED — *Continued.*

- an order overruling a motion to re-tax costs in the district court, **affirmed** *Hibbard v. Tomlinson*, 220. See also, 350.
- Sands v. Maclay*, *ante*, 35, reversed by United States Supreme Court, April, 1877.
- The case of *The United States v. McElroy*, *ante*, 237, deciding that an appeal from the district court, in a case arising under the laws of the United States and perfected according to the requirements of the Civil Practice Act, was irregular and unauthorized, is hereby overruled. *United States v. McElroy*, 494.
- The case of *Wilson v. Davis*, 1 Mon. 98, holding that the consent of parties cannot confer jurisdiction upon this court, **affirmed**. *Rader v. Nottingham*, 157.
- Wormall v. Reins*, 1 Mon. 630, **affirmed**. *Hartley v. Preston*, 415.

CATTLE.

See **ANIMALS**.

CERTIFICATE OF DEPOSIT.

Delivery — remedy for non-payment. W., as agent for F., deposited money in a bank and took a certificate of deposit, payable to his own order, three months after date. W. delivered the certificate to F., but refused to make a written indorsement thereon to F., and the bank refused to pay F., the owner and holder. *Held*, that said certificate is negotiable, and may be assigned by delivery without any writing. *Held*, also, that F. has a legal remedy against the bank, and cannot maintain a bill in equity to compel the payment of the certificate after W. has indorsed it. *Held*, also, that F. can maintain a bill in equity to compel W. to indorse said certificate to F. *Fultz v. Walters*, 165.

CHALLENGES.

See **JURY**.

CHINESE.

Rights of Chinese under "Burlingame Treaty." The sixth article of the treaty between the United States and the Empire of China, promulgated February 5, 1870 (16 U. S. Sts. 739), does not grant to the Chinese in the United States greater privileges than are guaranteed by the laws of congress to other aliens. *Territory v. Lee*, 124.

CIVIL ACTION.

1. "*Civil action*" defined — *trial — judgment.* In a civil action, the issues are formed by the averments of the complaint and denials of the answer or replication to new matter; and the trial of these issues takes place by the introduction of legal evidence to support the allegations of the pleadings, and the judgment is conclusive upon the rights of the parties. *Deer Lodge County v. Kohrs*, 66.
2. *Proceedings in probate court.* Proceedings charging an administrator with the commission of waste are not civil actions within the meaning of said Organic Act. *Id.*

CIVIL PRACTICE ACT.

- 2 *Pleading under civil practice act.* The Civil Practice Act has abolished the rule of the common law, which construed a pleading against the pleader

CIVIL PRACTICE ACT — *Continued.*

- and requires parties to state only the ultimate facts upon which they rely, in ordinary and concise language, and without repetition. *Daniels v. Andes Ins. Co.*, 78.
2. *Weight of New York cases as to.* The decisions of the New York courts upon the practice under the Code of that State are conflicting, and entitled to slight weight in interpreting the Civil Practice Act of this Territory. *Ib.*
 3. *Quo warranto — redress of public wrongs.* The first section of the Civil Practice Act, approved December 23, 1867, which provides that there shall be "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," does not apply to information in the nature of *quo warranto*, which are solely employed to enforce or protect public rights, and redress or prevent public wrongs. *Territory ex rel. Blake v. Virginia Road Co.*, 96.
 4. *Nature of mandamus proceedings.* A proceeding in mandamus is not a case at common law, or a civil action under the Civil Practice Act. *Chumasero v. Potts*, 242.

See APPEALS ; COSTS ; PLEADINGS ; PRACTICE ; SUMMONS.

CLAIM AND DELIVERY.

Action on undertaking — defense. It is a good defense, in an action on a replevin bond, to recover the value of property replevied in default of its return, to show that the plaintiff had taken such property into his possession by other process prior to judgment in the replevin suit. A plaintiff cannot have the property and a judgment against the sureties for its value at the same time. *Demers v. Clemens*, 385.

See COSTS, 5.

CLERK.

When must fill blank in judgment for costs — power to fill blank. In this action a judgment was entered against O. for the costs in March, 1872, and the blank left in the judgment for the amount thereof was filled by the clerk of the district court in March, 1875. A memorandum of the costs for \$115 was filed in March, 1872, and the sum of \$208 was inserted in the blank in March, 1875. *Held*, that the clerk is a ministerial officer and must fill said blank within two days, or a reasonable time after the costs have been ascertained. *Held*, also, that the voluntary act of the clerk in filling said blank is void. *Held*, also, that the fees of the clerk and sheriff should be included in said memorandum by the party claiming them. *Held*, also, that costs can only be recovered by a strict compliance with the Civil Practice Act. *Orr v. Haskell*, 350.

COMMON LAW.

Common law in force. The common-law remedies remain in force in the Territory if they have not been abolished by the statutes. *Territory v. Virginia Road Co.*, 96.

CONSTITUTIONAL LAW.

1. *Probate courts — jurisdiction defined by legislature.* The ninth section of the Organic Act of the Territory provides that "the jurisdiction of * * * probate courts * * * shall be limited by law," and thereby confers upon the legislative assembly the power to regulate the probate jurisdiction of the probate courts. *Deer Lodge County v. Kohrs*, 66.

CONSTITUTIONAL LAW—*Continued.*

2. *Jurisdiction is not limited by amount involved.* The second section of the amendment to the Organic Act, approved March 2, 1867, provides that the probate courts, "in addition to their probate jurisdiction, are hereby authorized to hear and determine civil causes wherein the damage or debt claimed does not exceed \$500," and certain "criminal cases." *Held*, that this section does not affect the probate jurisdiction of the probate courts. *Ib.*
3. *Mineral land—power of congress and legislature.* Congress, by the acts relating to the mineral land of the public domain, approved July 26, 1866, July 9, 1870, and May 10, 1872, has recognized the authority of the legislative assembly of the Territory and miners of districts to enact laws regulating the extent of mining claims which can be located, and the manner of working and developing the same, and appropriating the minerals therein contained. But the power to control and dispose of said land has been conferred upon congress by the constitution, and cannot be delegated to said assembly. *Territory v. Lee*, 124.
4. *Act concerning aliens holding mineral lands void.* The act of assembly, approved January 12, 1872 (ch. 82, Cod. Sts. 593), which provides "for the forfeiture to the Territory of placer mines held by aliens," is therefore unconstitutional and void. *Ib.*
5. *Rights of aliens under Organic Act.* The Organic Act of the Territory, approved May 26, 1864, does not sanction the principle of the common law which prohibits aliens from holding real estate. *Ib.*
6. *Power of Territorial governments—sovereignty.* The Territory has none of the essential attributes of sovereignty, and is a province over which congress exercises supreme control. The laws of the legislative assembly can be repealed by congress, and the Territorial courts have no final jurisdiction in cases in which the amount in controversy exceeds \$1,000. The authority to enact laws for the forfeiture of mineral public lands is a prerogative of sovereignty, and cannot be exercised by said assembly. *Ib.*
7. *Power of legislature to create county indebtedness for roads.* The legislative assembly enacted a statute, approved February 11, 1876, which authorized and required the commissioners of Deer Lodge county to issue county warrants to certain persons to reimburse them for constructing a wagon road in the county. The road was a public highway, on which the people of the county are accustomed to travel. A part of the expense of its construction has been paid by private subscription, but the remainder is unpaid. *Held*, that the road has been constructed for a municipal purpose and is beneficial to the people of the county, and that the statute is upon a rightful subject of legislation. *Wilcox v. Deer Lodge County*, 574.

Waiver by accused of right to confront witnesses. See CRIMINAL LAW, 17.

See STATUTORY CONSTRUCTION.

CONSTRUCTION.

See STATUTORY CONSTRUCTION.

CONTRACT.

1. *When enforced by mechanics' liens upon quartz lode and mill.* A. made a contract with H. to perform labor at the rate of \$2,500 per annum, and work one-half of his time upon H.'s quartz lode, and the other half upon H.'s mill, in which the quartz taken from the lode was to be worked. *Held*, that A. can secure payment for said labor by filing and enforcing in the same action one lien upon the lode and mill, or two separate liens upon said property. *Alvord v. Hendrie*, 115.
2. *Time for filing lien for said labor.* The time during which A. was to perform said labor for H. was not stated in said contract, and A. worked

CONTRACT — *Continued.*

under it twenty-one months. The sixth section of said act of the legislative assembly makes it the duty of a person wishing to avail himself of the said act to file with the county recorder, within sixty days after said labor shall have been performed, an account of his demand. *Held*, that A. was not required to file said account within sixty days after the end of the first year to secure a lien for the sum then due from H. under said contract. *Ib.*

Of carrier of passengers — nature of. See CARRIER.

CONVEYANCE.

See DEED.

COURTS, PROBATE.

1. *Jurisdiction defined by legislature.* The ninth section of the Organic Act of the Territory provides that "the jurisdiction of * * * probate courts * * * shall be limited by law," and thereby confers upon the legislative assembly the power to regulate the probate jurisdiction of the probate courts. *Deer Lodge County v. Kohrs*, 66.
2. *Cannot render judgments for waste.* The probate courts can make necessary orders for the settlement of the estates of deceased persons, but cannot render judgments against administrators for receiving moneys belonging to estates and failing to account therefor. *Ib.*
3. *Jurisdiction is not limited by amount involved.* The second section of the amendment to the Organic Act, approved March 2, 1867, provides that the probate courts, "in addition to their probate jurisdiction, are hereby authorized to hear and determine civil causes wherein the damage or debt claimed does not exceed \$500," and certain "criminal cases." *Held*, that this section does not affect the probate jurisdiction of the probate courts. *Ib.*
4. *"Civil action" defined — trial — judgment.* In a civil action the issues are formed by the averments of the complaint and denials of the answer or replication to new matter; and the trial of these issues takes place by the introduction of legal evidence to support the allegations of the pleadings, and the judgment is conclusive upon the rights of the parties. *Ib.*
5. *Proceedings in probate courts.* Proceedings charging an administrator with the commission of waste are not civil actions within the meaning of said Organic Act. *Ib.*
6. *Appeal from probate court proceedings.* An appeal is not allowed from the summary proceedings of the probate courts in determining charges of waste against administrators. *Ib.*

COUNTY FUNDS.

Money can only be drawn from the treasury of a county in pursuance of the statute. *Johnston v. Lewis and Clarke County*, 159.

COUNTY WARRANTS.

Statutory construction — interest upon county warrants. The act approved January 11, 1872, provided that county warrants should not bear interest after its passage. The act approved January 12, 1872, provided that said warrants should bear interest at the rate of ten per cent per annum after they had been presented to the county treasurer and duly indorsed not paid. *Held*, that the first act was repealed by the last, and that the warrants bear interest at said rate. *Higgins v. Edwards*, 585.

See MUNICIPAL CORPORATION.

COSTS.

1. *Order taxing costs not appealable.* A party cannot appeal to this court from an order of the court below, taxing costs. *Rader v. Nottingham*, 157.
2. *Retaxing.* The case of *Rader v. Nottingham*, ante, 157, holding that no appeal lies from an order overruling a motion to re-tax costs in the district court, affirmed. *Hibbard v. Tomlinson*, 220.
3. *Motion to relax costs.* A motion to re-tax costs must be supported by the records of the case, or affidavits, or a statement showing the illegal charges. *Ib.*
4. *Statutory construction—costs.* The 417th and 551st sections of the Civil Practice Act regulate costs on appeal, and must be construed together. *Ib.*
5. *Costs on appeal from probate to district courts.* In an action for the claim and delivery of personal property, the party who appeals to the district court from a judgment rendered against him in the probate court, for the wrongful detention of the property, and reduces the amount of the damages more than \$10, is not entitled to his costs on the appeal. *Ib.*
6. *Blank for, in judgment—power of clerk.* In this action a judgment was entered against O. for the costs in March, 1872, and the blank left in the judgment for the amount thereof was filled by the clerk of the district court in March, 1875. A memorandum of the costs for \$115 was filed in March, 1872, and the sum of \$208 was inserted in the blank in March, 1875. *Held*, that the clerk is a ministerial officer and must fill said blank within two days, or a reasonable time after the costs have been ascertained. *Held*, also, that the voluntary act of the clerk in filling said blank is void. *Held*, also, that the fees of the clerk and sheriff should be included in said memorandum by the party claiming them. *Held*, also, that costs can only be recovered by a strict compliance with the Civil Practice Act. *Orr v. Haskell*, 350.
7. *Retaxing.* The case of *Rader v. Nottingham*, ante, 157, holding that an order of the district court overruling a motion to re-tax costs is not appealable, affirmed. *Ib.*
8. *Amount of, on question of jurisdiction.* The amount of the costs forms no part of the matter in dispute when questions of jurisdiction are considered. *Payne v. Davis*, 381.
9. *Effect of admission of one cause of action.* The four hundred and forty-second section of the Civil Practice Act authorizes a defendant to serve upon the plaintiff an offer to allow judgment to be taken against him for a certain sum, and the plaintiff cannot recover costs if he fails to obtain a more favorable judgment. W. admitted in his answer, that he owed the amount stated in one cause of action in G.'s complaint, and G. did not "obtain a more favorable judgment." *Held*, that W. did not make the offer described in the statute, and G. recovered his costs. *Gans v. Woolfolk*, 458.
10. *Order securing costs intermediate.* An order of the court requiring a plaintiff to give security for the costs, or justify, is intermediate and can be reviewed on an appeal from the judgment dismissing the action upon the failure of the party to comply with the same. *Marsh v. Kinna*, 547.
11. *Affidavit asking security for costs.* The affidavit of a defendant to the effect that he is acquainted with the financial condition of the plaintiff, and that, to the best of his knowledge and belief, the plaintiff is unable to pay the costs likely to accrue in the action, is sufficient under the five hundred and sixty-second section of the Civil Practice Act. *Ib.*
12. *Order requiring security for costs.* Upon the filing of said affidavit the court made an order that the plaintiff give security for the costs, or justify in a certain amount before the trial. *Held*, that the defendant, under said order and section, could give a proper bond, or justify, or deposit money with the clerk, or prove certain facts and prosecute his action without pre-paying the costs. *Held*, also, that the court properly dismissed the

COSTS — *Continued.*

action upon the refusal of the plaintiff, after a reasonable time, to perform any of these acts. *Ib.*

13. *Taxation of costs of receiver.* E. brought this action to restrain C. from working mining property and obtaining the possession of the same, and recovered a judgment. After a hearing, a receiver was appointed under a written stipulation of the parties, to take charge of the property during the litigation. The costs of the receiver were taxed against the proceeds of the property and E. then made said motion. *Held*, that no facts controlling the sound discretion of the court appear in the record, and that the costs of the receiver should have been taxed against C. *Ervin v. Collier*, 605.

CRIMINAL LAW.

1. *Allegation of crime in indictment.* Under the Criminal Practice Act of the Territory, an indictment is sufficient which alleges, clearly, a crime and notifies the accused of the act which is complained of; and the highest degree of certainty is not required. *Territory v. Ashby*, 89.
2. *Description of alley in indictment for obstructing highway.* An indictment contains a sufficient description of a public alley, which alleges that there was, in Helena, an ancient highway, known as — alley, in a certain block leading from thence to Rodney street, and that the accused erected a fence across said alley, near the west end of said Rodney street, and continued the same a certain time. *Ib.*
3. *Prosecution after repeal of statute.* A party cannot be convicted of an offense after the statute defining it has been repealed, and there is no legislation saving pending prosecutions. *Ib.*
4. *Obstruction of highways — joinder of offenses.* An indictment, which alleges that a party obstructed a public alley by the erection of a fence upon a certain date, and continued to maintain the same thereafter, does not state two offenses that cannot be joined. *Ib.*
5. *Allegation of time in indictment under different statutes.* An indictment, which alleges that the accused obstructed a highway from June 21, 1872, to November 2, 1872, is not invalidated by the repeal of the old law defining the offense and the passage of a new law relating thereto on August 1, 1872. *Ib.*
6. *Peremptory challenges.* A party, who has been indicted for grand larceny and receiving stolen goods in violation of the laws of the United States, is entitled to three peremptory challenges to the jury impaneled to try the case, under chapter 333, acts 42d congress, approved June 8, 1872. *United States v. Upham*, 113.
7. *Indictment — description of court.* The caption of the indictment in this case described the court as "the United States District Court of the Territory of Montana, for the Second Judicial District." *Held*, that there is no "United States District Court" in said Territory. *Held*, also, that the indictment is not vitiated by this erroneous description of the court, because the record accompanying the indictment shows that the same was found by a court having jurisdiction of the offense charged. *United States v. Upham*, 170.
8. *Indictment for conspiracy to defraud the United States.* Said indictment charged that three persons, an Indian agent, his clerk and a trader, conspired and agreed together to procure the goods of the United States, to be disposed of fraudulently for money, and thereby intended to cheat and defraud the United States. *Held*, that said indictment is good. *Ib.*
9. *Embezzlement — Indian agent.* There is no statute of the United States under which an Indian agent can be indicted for embezzlement. *Ib.*
10. *Evidence of fraud — distribution of Indian goods.* Upon the trial of said persons, under said indictment, it appeared that said goods had been

CRIMINAL LAW — *Continued.*

- deposited with said Indian agent for distribution to the Indians. *Held*, that the government could prove that the Indians had not received the goods. *Ib.*
11. *Verdict in criminal case.* A verdict of guilty in a criminal action will be sustained if there is substantial proof to support it. *Ib.*
 12. *Evidence withdrawn by court from jury.* A witness was asked if one of said persons had made any confession to him, and, during the discussion of an objection to the question, answered that he had. The answer was withdrawn from the jury by the court. *Held*, that the rights of said person were not prejudiced by these proceedings. *Ib.*
 13. *Bias of juror — verdict set aside.* A person who has talked about the "Indian agency cases," and evinced bias generally in such cases, is not competent to serve as a juror upon the trial of said Indian agent for conspiring, with others, to defraud the United States; and a verdict of guilty returned by the jury (of which he was a member), in this case, must be set aside. *Ib.*
 14. *Right of prisoner to counsel.* The 6th article of the amendments to the constitution of the United States has abrogated the rule of the common law by which a prisoner was not entitled to appear by counsel. *Johnston v. Lewis and Clarke County*, 159.
 15. *Compensation of attorney appointed by courts.* An attorney, who has been appointed by the district court to defend an indigent prisoner charged with the commission of a felony, is required to perform this duty; but he cannot recover compensation for his services from the county in which the trial occurs. *Ib.*
 16. *Appeals in criminal causes.* The appellant was indicted at the November term, 1872, and tried and convicted at the June term, 1873; a bill of exceptions was signed, but no notice of appeal was ever given; upon application, the judge refused to correct the bill in vacation and within six months after the rendition of the judgment; the bill was corrected at the following term, more than six months after the judgment had been rendered. *Held*, that this court did not have jurisdiction of the case. *Territory v. Fallis*, 236.
 17. *Right of accused to be confronted with witnesses.* A party who has been indicted for the commission of a misdemeanor, waives his constitutional right "to be confronted with the witnesses against him," by admitting that witnesses, if present, would testify to certain facts stated in the affidavit of the district attorney for a continuance, and thereby preventing a postponement of the trial. *United States v. Sacramento*, 239.
 18. *Evidence — admission of affidavit for a continuance.* Upon the trial of the appellant under an indictment charging him with selling, unlawfully, spirituous liquor to an Indian in the Indian country, the affidavit of the district attorney, in support of his motion for a continuance, set forth that he could not proceed to a trial without the testimony of absent witnesses, who would testify that they saw the appellant so sell said liquor. The appellant, in open court, then offered to admit that the witnesses, if present, would testify to the facts stated in the affidavit, and the motion was denied. *Held*, that the affidavit was admissible as evidence against the appellant upon the trial. *Ib.*
 19. *Impeaching witness — cross-examination — extent of information — jury not judge to decide.* An impeaching witness may be cross-examined as any other to discover the grounds and extent of his information. If such witness shows that he has any information on the subject, the testimony should be admitted and the jury not the judge determine what weight to attach to it. *Territory v. Paul*, 314.
 20. *Larceny — intent.* It is error to charge the jury that simply killing an ox, with another party, knowing the ox was not the property of that other party, but that it belonged to a third party, amounts to larceny, without

CRIMINAL LAW — *Continued.*

- adding thereto, "with a view of converting it to his own use, or of permanently depriving the owner thereof." The error is not cured, though elsewhere in the charge larceny is correctly defined. *Ib.*
21. *Evidence — testimony of wife.* The testimony of a wife is not admissible in behalf of a prisoner jointly indicted with her husband where it would tend to influence the case against her husband. The statute does not change the rule of common law. *Ib.*
 22. *Murder — degrees — indictment.* The statutes of Montana (Cod. Sts. 273, § 21) make murder to consist of two degrees. The killing of a human being with malice aforethought, by means of poison, lying in wait, torture, or other willful, deliberate or premeditated means, or in the perpetration or the attempt to perpetrate arson, rape, robbery or burglary, is murder of the *first* degree. All other cases of killing with malice aforethought, express or implied, are murder of the *second* degree. The form of the indictment may be the same in both cases, and the *degree* of the offense is to be determined by the evidence of deliberation, premeditation, torture, etc. *Territory v. Stears*, 324.
 23. *Verdict — degree of offense.* The verdict of the jury alone, without reference to the indictment, judge's charge, or record of the evidence, must designate and express the degree of the offense, as well as the guilt. It is not enough to find one guilty as charged in the indictment, though the indictment may clearly charge the offense in the *first* degree. The jury alone must find the degree of the offense from the evidence, and designate it in their verdict. A failure to do so vitiates the verdict, and nullifies any judgment based thereon. *Ib.*
 24. *Appeal by Territory in criminal case.* A demurrer to the indictment in this action was sustained on the ground that the court did not have jurisdiction of the offense, and the Territory appealed. The three hundred and ninety-fifth section of the Criminal Practice Act provides that the Territory can appeal when judgment is rendered for the defendant in quashing or setting aside an indictment. *Held*, that this appeal has been properly taken by the Territory. *Territory v. Flowers*, 392.
 25. *Statutory construction — time for appealing and filing transcript in criminal case.* The notice of appeal was filed and served October 10, 1874, and the transcript was filed in this court December 28, 1874. The three hundred and ninety-sixth section of the Criminal Practice Act provides that "the transcript must be filed within thirty days after the appeal is taken." *Held*, that this statute is directory, and that the delay of the Territory in filing the transcript does not authorize this court to dismiss this appeal. *Ib.*
 26. *Mittimus — recognizance — variance.* An attempt to commit murder, and an assault with intent to commit murder, are different offenses under our statutes. If the order of the magistrate required defendants to appear and answer a certain crime, a recognizance conditioned to answer any other offense is bad. There is no consideration for such a contract. *Territory v. Hildebrand*, 426.
 27. *Continuance.* The provisions of the Civil Practice Act relating to the postponement of the trial of civil actions are applicable to criminal cases. *Territory v. Perkins*, 467.
 28. *Admissions by district attorney.* The district attorney has the right to admit, in behalf of the Territory, that absent witnesses will testify to the facts stated in the affidavit of the defendant for a continuance. *Ib.*
 29. *Continuance of criminal case — discretion.* The judgment in a criminal case will not be reversed for the refusal of the court to postpone the trial, if there has not been an abuse of judicial discretion. *Ib.*
 30. *Evidence — disposition of injured party in criminal case.* Upon the trial of an indictment, charging the commission of an assault with intent to commit murder, when the testimony is direct and the defendant and injured

CRIMINAL LAW — *Continued.*

party are witnesses, evidence that the injured party is a vicious and revengeful man, and in the habit of carrying and drawing a pistol and getting the drop on his adversary, is not admissible. *Ib.*

31. *Assault with intent to commit murder — form of verdict.* The statute does not divide into degrees the crime of an assault with intent to commit murder, and the following verdict, under an indictment charging this offense, is sufficient: "We, the jury, find the defendant guilty, as charged in the indictment." *Ib.*
32. *Common-law offenses — in force.* Section 185 of the Criminal Laws of Montana provides that all offenses recognized by the common law as crimes, and not herein enumerated, shall be punishable, etc., and classifies such crimes as felony or misdemeanor. Section 6 of our Criminal Practice Act confers jurisdiction of such offenses upon district courts, and section 5 of same act provides that prosecution in such cases shall be by indictment. This statute is in force and should be given its full effect. *Territory v. Ye Wan*, 478.
33. *Nuisance — interpretation — offenses.* The term *offenses*, as used in this statute, applies to certain acts and intentions, or acts and criminal negligence, and all such acts or omissions, as would constitute nuisance at common law, and are not enumerated in our statute, in section 147 of Criminal Law, are still indictable under section 185 of the same law. It is the act that constitutes the offense and that is punishable, and it matters nothing what name is attached to it. *Ib.*
34. *Repeal — implication.* As to acts specified in said section 147, there can be no common-law nuisance, the statute having taken its place; but all other acts that constituted nuisance at common law, do so still under section 185. The common law is only so far repealed by implication, as the statute directly excludes it. *Ib.*
35. *Appeal — United States cases.* No appeal lies in criminal cases from an order overruling a motion for a new trial, but only from a judgment. A motion for a new trial must be made before judgment, and if denied the remedy will be by appeal from the judgment. *Quere*, whether the Criminal Practice Act of the Territory applies to cases arising under the United States laws. Appeals are not allowed in criminal cases in the United States courts. *United States v. Smith*, 487.
36. *Embezzlement — fiduciary capacity — conversion — direct averments.* To constitute the crime of embezzlement, the elements of the fiduciary relation and the conversion are essential, and each must be covered by direct averments and not left to implication, or the indictment will be demurrable. *United States v. McElroy*, 494.

Jurisdiction in actions for assault and battery. See JURISDICTION, 20.

CRIMINAL PROCEDURE.

See COMMON LAW.

CROSS-APPEALS.

Transcript. Every party to an action can appeal from the judgment, and must prepare his transcript for this court. *Plaisted v. Nowlan*, 359.

DAMAGES.

Measure of — injunction — undertaking — attorney fees. In a suit on an undertaking given to procure a temporary injunction, the merits of which were never tried, no recovery could be had for attorney fees expended in the main suit to determine the title to the waters in dispute, and evidence offered for such purpose was properly excluded. The case of *Campbell v. Metcalf*, 1 Mon. 381, affirmed and applied. *Allport v. Kelley*, 343.

DECREE.

In mortgage foreclosure. See MORTGAGE.

DEED.

1. *By trustee of town site.* The trustee of a town site upon the public lands, under the laws of the United States and this Territory, has no right to make a deed of a vacant lot to a citizen who is not in the possession of, or without the right of possession to, the premises. *Edwards v. Tracy*, 49.
2. —. Such a trustee has no judicial power, and cannot execute a deed of a town lot to an applicant who has not complied strictly with the law. *Ib.*
3. *Sale of unclaimed lots.* The deed to an unclaimed lot in a town site is void, if the trustee has executed the same without advertising that it would be sold at public sale. *Ib.*
4. *Conveyance of water right — possession.* Under the laws of this Territory, the transfer of a ditch and water right requires the same form and solemnity as a conveyance of real estate; but an interest in such property can be acquired by appropriation. *Barkley v. Tieleke*, 59.
5. *Imperfect conveyance of water right — abandonment.* The attempt to convey a water right by an imperfect deed operates as an abandonment of the title obtained by the appropriation thereof. *Ib.*

DEFENSE.

To action on replevin bond. It is a good defense, in an action on a replevin bond, to recover the value of property replevied in default of its return, to show that the plaintiff had taken such property into his possession by other process prior to judgment in the replevin suit. A plaintiff cannot have the property and a judgment against the sureties for its value at the same time. *Demers v. Clemens*, 385.

DEMAND

See ATTACHMENT.

DEMURRER.

1. *Demurrer for misjoinder.* A demurrer for the misjoinder of parties defendant, which does not show wherein there is such misjoinder, will be overruled. *Fultz v. Walters*, 165.
2. *Demurrer for want of equity.* A demurrer upon the ground that the complaint does not show sufficient equity to charge a party cannot be made under the specification that there is a misjoinder of parties. *Ib.*
3. *Complaint — several causes.* When the demurrer is to the whole of the complaint, containing several causes of action, and either one is sufficient, it fails. *Collier v. Ervin*, 335.
4. *Improper joinder — ground of demurrer specified.* Any demurrer to complaint, except for want of cause of action, and of jurisdiction, as if for improper joinder of action, should specifically point out the defect, or it will be disregarded. The mere language of the statute in such case is insufficient for the purpose. *Ib.*

See PLEADING, 31; PRACTICE, 49.

DENIAL.

See PLEADING, 1, 2, 3, 16, 80.

DISTRICT ATTORNEY.

1. *Fees of — repeal of act of 1865.* The act of the legislative assembly, approved January 10, 1865, which fixed the fees to be paid to district attorneys, was repealed by implication by the act, approved February 9, 1865, which established different fees for the same services. *Williams v. Jefferson County*, 26.
2. *Fee of district attorney.* The act, approved February 9, 1865, allowed the district attorney a fee "for drawing each indictment * * * provided that no fee shall be allowed for drawing any indictment that may be quashed." *Held*, that district attorneys are not entitled to fees for drawing indictments, which have been quashed for any cause. *Held*, also, that district attorneys are entitled to the fee for drawing an indictment, which has been returned by the grand jury and duly indorsed, "not a true bill." *Ib.*
3. *Docket fee of district attorney.* The act approved February 9, 1865, allowed the district attorney fees for "convictions of misdemeanors," "convictions for felony," "convictions in capital cases," and "docket fees in all cases not above specified, where county attorney is required to prosecute or defend in district courts." *Held*, that district attorneys are not entitled to docket fees in criminal cases. *Ib.*
4. *Admissions by district attorney.* The district attorney has the right to admit, in behalf of the Territory, that absent witnesses will testify to the facts stated in the affidavit of the defendant for a continuance. *Territory v. Perkins*, 467.

DISTRICT COURT.

1. *Jurisdiction and practice.* The Organic Act of Montana Territory, approved May 26, 1864, confers upon the district courts of the Territory the jurisdiction and practice of the district and circuit courts of the United States in cases arising under the constitution and laws of the United States. *United States v. Upham*, 113.
2. *Powers — limitations — case affirmed.* The Organic Act that confers upon the district courts common-law and chancery jurisdiction, and also the jurisdiction exercised by the United States circuit and district courts, provides that this jurisdiction, in all alike, shall be as limited by law. This limitation may extend to the *mode* of exercising this jurisdiction, and applies to all branches of that jurisdiction. *Case of Gallagher v. Basey*, 1 Mon. 457, affirmed. *United States v. Ensign*, 396.
3. *Practice — common-law forms — scire facias — complaint.* The Civil Practice Act applies as well to cases in which the district court exercises the jurisdiction of the United States circuit and district courts, and in which the United States is a party. The common-law forms of procedure, including *scire facias*, are done away, and a complaint is necessary in all civil actions. *Ib.*

DOCKET FEES.

District attorney not entitled to, in criminal cases. See DISTRICT ATTORNEY.

EJECTMENT.

1. *Pleading in — proper allegations of complaint — sham denials.* The complaint in this case alleges that plaintiff is seized in fee and entitled to the immediate possession of a certain tract of land; that defendants are in the possession and withhold the same from the plaintiff, and that plaintiff has been damaged in the sum of \$300. The answer denies the right of the plaintiff to the possession, and the wrongful withholding of the property, and that plaintiff has been damaged. *Held*, that the complaint states a good cause of action; that the answer is sham and irrelevant, and that

EJECTMENT — *Continued.*

- judgment was properly rendered for the plaintiff upon the pleadings *McCauley v. Gilmer*, 202.
2. *Seisin — possession.* In actions of ejectment the plaintiff must prove that he is seised of the premises, or some estate therein. In the absence of adverse possession, the right of possession follows the seisin in law. *Davis v. Clark*, 394.
 3. *Statutory construction — limitations — quartz lodes.* The amendments to the statute of limitations, approved January 11, 1872, changed the order and character of the evidence in actions for the recovery of claims upon quartz lodes; and the plaintiff must show that he was in the actual possession of the same within one year next before the commencement of the action. *Ib.*
 4. *Equitable defense.* In an action of ejectment the defendant may set up an equitable defense, and a prayer in the answer for costs is appropriate relief. *Reece v. Roush*, 586.

ELECTION.

1. *Petitioners for mandamus.* Any citizen of the Territory may be the relator in an application for a writ of mandate, when the subject-matter relates to the validity of an election. *Chumaseo v. Potts*, 242.
2. *Duty of Territorial canvassers.* Under the laws of the Territory, the governor, secretary and marshal of Montana must act together in canvassing the votes upon "An act to change the seat of government of the Territory of Montana," "known as the Capital Law," approved February 11, 1874. *Ib.*
3. *Elector who is "beneficially interested."* An elector of the Territory is "beneficially interested" in legal proceedings to compel its officers to perform their duties, and is the proper party to apply for the writ of mandate to secure this result. *Ib.*
4. *Certificate of canvassers.* The certificate of the Territorial canvassing board, upon the vote for the approval of the Capital Law, is *prima facie* evidence of the legal vote cast at the general election; and the members of the board have no right to go behind the abstracts of the votes returned to it. *Ib.*

EMBEZZLEMENT.

1. *Indian agent.* There is no statute of the United States under which an Indian agent can be indicted for embezzlement. *United States v. Upham*, 170.
2. *Fiduciary capacity — conversion — direct averments.* To constitute the crime of embezzlement, the elements of the fiduciary relation and the conversion are essential, and each must be covered by direct averments and not left to implication, or the indictment will be demurrable. *United States v. McElroy*, 494.

EQUITY.

1. *Water right — remedy of claimants.* Equity affords the appropriate remedy in an action in which both parties claim the prior right to the use of water for mining purposes. *Barkley v. Tieleke*, 59.
2. *When will relieve against mistake in law.* C. obtained a decree for the foreclosure of a mortgage upon certain mining ground of F., E. and M.; F. paid to C. one-half of the judgment and C. released to him one-half of the mining ground described in the decree; E. and M. agreed orally, that the release of F. should not affect their liability under the decree; the agreement, which an attorney was employed to reduce to writing, in legal effect, through a mistake or ignorance of the law by the writer released F., E. and M. *Held*, that the release to E. and M. should be set aside, and that E. and M. cannot in good conscience retain the advantage acquired under the written agreement. *Collier v. Field*, 205.

ESTOPPEL.

1. *Recapture of water — estoppel.* The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another. *Barkley v. Tieleke*, 59.
2. The doctrine of estoppel does not apply to prevent a mortgagee from purchasing the mortgaged premises or a portion thereof, when sold under the foreclosure of mechanic's liens, nor to prevent his taking possession of such premises under a writ of assistance when the time of redemption under such sale has expired, nor are the rights thus acquired lost or merged in his subsequent foreclosure of his mortgage. *Vantilburgh v. Black*, 371.

By judgment. See EVIDENCE, 7.

Of sureties on bond. See BOND.

EVIDENCE.

1. *Record of case adjudged inadmissible.* In the trial of an action brought by E. to set aside a deed delivered to T., the court erred in admitting as evidence the record of a case between T. and the trustee of a town site, in which T. failed to procure a writ of mandate, requiring said trustee to make said deed. *Edwards v. Tracy*, 49.
2. *Insurance policy — examination of plaintiff.* In this action to recover under said pleadings upon a policy of insurance, the following question was propounded to plaintiff, upon his direct examination: "State whether or not you complied substantially with the conditions of the policy issued to you by the Andes Insurance Company, on the 1st of April last?" He answered, "I think I did; I did." The court refused to allow defendant to cross-examine plaintiff respecting the manner in which he performed each condition of said policy. *Held*, that the question was too general and leading, and that the only answer would be a conclusion of law. *Held*, also, that the court should have permitted said cross-examination of plaintiff by defendant. *Daniels v. Andes Ins. Co.*, 78.
3. *Of fraud — distribution of Indian goods.* Upon the trial of an Indian agent and others, under an indictment for conspiring and agreeing together to procure the goods of the United States to be disposed of fraudulently for money, etc., it appeared that said goods had been deposited with said Indian agent for distribution to the Indians. *Held*, that the government could prove that the Indians had not received the goods. *United States v. Upham*, 170.
4. *Admission upon trial of affidavit for a continuance.* Upon the trial of the appellant under an indictment charging him with selling, unlawfully, spirituous liquor to an Indian in the Indian country, the affidavit of the district attorney, in support of his motion for a continuance, set forth that he could not proceed to a trial without the testimony of absent witnesses, who would testify that they saw the appellant so sell said liquor. The appellant, in open court, then offered to admit that the witnesses, if present, would testify to the facts stated in the affidavit, and the motion was denied. *Held*, that the affidavit was admissible as evidence against the appellant upon the trial. *United States v. Sacramento*, 239.
5. *Testimony of wife.* The testimony of a wife is not admissible in behalf of a prisoner jointly indicted with her husband where it would tend to influence the case against her husband. The statute does not change the rule of common law. *Territory v. Paul*, 314.
6. *Best proof of location and possession of mining claim.* C. brought this action to recover damages for a trespass upon a mining claim in a certain gulch. Before the trial C. moved for a continuance, and offered an affidavit in support of his motion, showing that the written laws of the gulch had been destroyed; that the laws regulated the location and holding of the claim in controversy, and defined its boundaries; and that the prede-

EVIDENCE—*Continued.*

cessors in interest of C. owned and possessed the claim under these laws, which were then in force. At the trial, C. offered oral testimony to prove that he owned and possessed the claim; that R. trespassed thereon, and admitted that there was such a claim, and that he knew where the claim was, and was upon it on a certain day. C. also offered some judgments and deeds. The testimony was excluded by the court. *Held*, that the court can direct the order of proof and require the best evidence to be produced before any other testimony is submitted. *Held*, also, that the affidavit for the continuance disclosed the best evidence that could be produced at the trial by C., and that the court properly rejected the testimony of C. at the time it was offered. *Campbell v. Rankin*, 363.

7. *Estoppel by judgment when many issues of fact are submitted to jury.* At the trial, C. offered in evidence the judgment entered in his favor in an action commenced by R. against C. to recover the possession of a mining claim in Confederate gulch and \$250 damages. C. maintained that the same property was involved in both cases, and that R. was estopped from denying that C. owned it. It appears from the pleadings that R. was required to prove that he was the owner of the claim, or entitled to its possession, and that C. wrongfully entered thereon and took and withheld its possession from R. The court excluded the evidence. *Held*, that a judgment which has been rendered in an action that has been tried upon its merits is a bar to another suit between the same parties, or their privies, for the same cause. *Held*, also, that the judgment offered by C. may have been based upon one of a number of questions of fact, and is not conclusive upon any of them in this action, when there are no means of determining upon which the verdict has been found. *Ib.*
8. *Proof of negative averment—satisfaction of undertaking—value of goods.* G. brought this action upon an undertaking in an attachment suit to return the attached property (carpet), "if return thereof be adjudged," and alleged in the complaint that "no return of the property has been had." *Held*, that the burden of proof rests upon G. to establish this negative averment. *Held*, also, that the condition of said undertaking would be satisfied by a written notice to G. and the officer, that the carpet would be delivered to them at the hotel where it was laid, and a request that they go and receive it, and the payment of the judgment recovered by the officer against B. *Held*, also, that testimony that the carpet is worthless, or has depreciated in value, is not competent. *Gans v. Woolfolk*, 458.
9. *Disposition of injured party in criminal case.* Upon the trial of an indictment, charging the commission of an assault with intent to commit murder, when the testimony is direct and the defendant and injured party are witnesses, evidence that the injured party is a vicious and revengeful man, and in the habit of carrying and drawing a pistol and getting the drop on his adversary, is not admissible. *Territory v. Perkins*, 467.
10. Affidavits taken by a commissioner of the United States are not admissible as evidence in the trial of an action in the courts of the Territory. *Daniels v. Andes Ins. Co.*, 500.
11. *Declarations of driver of coach about accident.* R., a passenger for hire, sued G., a common carrier of passengers, to recover damages for injuries caused by the overturning of G.'s sleigh. At the trial, R. offered in evidence the following statements of G.'s driver, which were made immediately after the accident and while he was in charge of the sleigh: "He could have avoided the overturning of the sleigh if he had been paying the slightest attention. It was his carelessness and there was no necessity for it." *Held*, that the statements were not within the scope of the driver's authority and were not admissible against G. *Ryan v. Gilmer*, 517.
12. *Statement of discovery of quartz lode—identity of names and persons.*

EVIDENCE — Continued.

In this action by S. to recover a quartz lode from P., S. offered in evidence a paper purporting to be the original declaratory statement, signed by the discoverer of the lode and sworn to before W. P., the county recorder. P. called as a witness W. P., who testified that his signature to the jurat of the statement was not genuine. S. then proved that he had sent the original statement to the land office in Helena, Montana, and offered in evidence a certified copy of the statement by the county recorder. S. claimed that he was surprised by the testimony of W. P., and that P. did not prove that the witness, W. P., was the county recorder. *W. P. Held*, that the production of the original statement was required at the trial, and that S. could not offer in evidence a copy thereof. *Held*, also, that the identity of the names of W. P., the witness, and W. P., the county recorder, is *prima facie* evidence of the identity of their persons. *Stapleton v. Pease*, 550.

13. *Pleading — denial of ownership.* Under an answer denying "each and every allegation" in the complaint, which alleged that the plaintiff was the owner of certain personal property, the defendant may prove that he owned the same. *Staubach v. Rexford*, 565.
14. *Ownership — license to enter inclosed field.* At the trial plaintiff testified that said property belonged to him, and was in his inclosed field when taken wrongfully. Defendant offered evidence to prove that plaintiff agreed to and did sell to him the property, and that under this agreement he entered the field and took the property. The evidence was rejected. *Held*, that the evidence relating to the ownership should have been admitted, and that, under said denial, the evidence relating to the privilege to enter the premises was properly excluded. *Ib.*
15. *Authentication of articles of incorporation.* In this action B. claimed that the firm had been incorporated under the laws of the State of Iowa, that required the articles of incorporation to be recorded in the offices of the secretary of State and recorder of deeds of the proper county. The statutes of this Territory do not prescribe the manner in which the articles should be authenticated to entitle them to be offered in evidence. The laws of the United States require a certificate by the governor, a justice, or certain other officers, that the attestation is in due form of law. *Held*, that the articles of incorporation could not be admitted in evidence without the certificate of the attestation by the proper officer, or proof of user. *Parchen v. Peck*, 567.
16. *Instructions.* Courts should not state evidence to the jury in the form of an instruction, nor give an instruction when there is no evidence requiring it. Courts determine whether there is any evidence tending to establish a fact, and the jury determine whether the evidence does establish the fact. *Ib.*

EXCEPTIONS.

Findings of court — if of fact must be specific. A general exception to the findings of the court is insufficient. If to findings of fact, it should specifically point out wherein the finding was erroneous. *Collier v. Ervin*, 335.

EXECUTION.

1. *Appeal from order quashing execution.* An appeal can be taken to this court from an order overruling a motion to quash an execution. *Orr v. Haskell*, 350.
2. *Stay of — judgment.* No part of the judgment can be executed, if the proper undertaking to stay the execution has been given. *Plaisted v. Nowlan*, 359.
3. *Married woman's separate property.* Where a married woman has filed a

EXECUTION — Continued.

- list of her separate property, as required by law, it is not liable to seizure on execution against her husband. *Vantilburgh v. Hamilton*, 413.
4. *Supplementary proceedings.* The enforcement of the Civil Practice Act, relating to proceedings supplementary to an execution, will aid a party to recover money from a debtor who has property in his possession. *Boley v. Griswold*, 447.
 5. *Sale by — fraud of creditor.* The sale of real property under an execution, which has been issued in excess of the judgment through the fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of *bona fide* purchasers. *Roush v. Fort*, 482.
 6. *Mistake of creditor.* The judgment creditor acquires the title to the property of the debtor under a sale, by virtue of an execution, that has been issued through his mistake in excess of the judgment. *Ib.*
 7. *Purchase by fraudulent trustee.* A trustee, who receives the rents of the property which has been delivered to him by his debtor, and does not apply the same upon the judgments according to his agreement, and causes the property to be sold under an execution in excess of the judgment, after allowing the proper credits, and becomes the purchaser, is faithless in the performance of his trust, and the sale will be set aside upon the motion of the debtor. *Ib.*
 8. *Order refusing to stay execution appealable.* The judge at chambers made an order in May, 1876, and refused to stay until the next term of the court an execution upon a judgment which had been entered in December, 1874. *Held*, that this is a "special order made after final judgment," and therefore appealable. *Clarke v. Gonu*, 538.
 9. *Review of said order — discretion.* The making of said order is an exercise of judicial discretion, which will not be reversed unless there has been a clear abuse of this discretion. *Ib.*

FEDERAL OFFICERS.

Duties of. The legislative assembly can require the Federal officers of the Territory to perform duties which are not enumerated in said Organic Act. *Chumasero v. Potts*, 242.

FEEES.

See DISTRICT ATTORNEY.

FENCE.

See ANIMALS; PLEADING, 28.

FORECLOSURE.

See MORTGAGE.

FRANCHISE.

1. *Complaint in actions for usurpation of a franchise.* In this action the complaint alleged that defendant, for more than three years, used certain franchises, which were specified; that defendant, during this time, usurped said franchises; that defendant claims the right to use said franchises, under an act of the legislative assembly of the Territory, entitled "An act to incorporate the Virginia City and Summit City Wagon Road Company," approved January 27, 1865; that said right of defendant was without warrant, grant or charter, and that defendant had forfeited said right by its failure to comply with said act, and maintain and keep in

FRANCHISE — Continued.

- repair its toll-road. *Held*, that this complaint is sufficient at common law and under the Civil Practice Act. *Territory v. Virginia Road Co.*, 96.
2. *Allegation of incorporation.* The sixty-first section of the Civil Practice Act, approved December 23, 1867, provided that "in pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof." *Held*, that said act of incorporation was made a part of said complaint by said reference, and the court must find that defendant is a corporation. *Held*, also, that said complaint should not contain any other allegation that defendant is a corporation. *Ib.*
 3. *Statutory remedy for usurpation — private remedy.* The eighth section of said act of incorporation gives persons the right to make complaints of the bad condition of the defendant's road before a justice of the peace, and prescribes fines and other penalties against defendant for a failure to keep its road in good repair. *Held*, that this remedy does not modify the common-law and statutory remedy for the usurpation of a franchise by defendant. *Held*, also, that defendant subjects its franchise to forfeiture upon its failure to keep its road in good condition. *Ib.*
 4. *Grants of franchises.* Grants by the legislative assembly which confer franchises are contracts between the sovereign power of the Territory and private citizens, upon certain conditions precedent, which must be complied with. *Ib.*
 5. *Pleading in quo warranto and actions for usurpation.* The fifth chapter of the eighth title of the Civil Practice Act, approved December 23, 1867, which provides for actions for the usurpation of a franchise, is the same in effect as the common law relating to informations in the nature of *quo warranto*, and the sufficiency of a complaint for the usurpation of a franchise is determined by the rules of the common law. *Ib.*

FRAUD.

See **SALE BY EXECUTION**; **STATUTE OF FRAUD.**

GAMES OF CHANCE.

Poker — a game of chance — within the statute — for the court and not for the jury to decide. It is a question for the court and not for the jury to decide whether the game of cards, usually denominated "poker," is a game of chance and within the statute, requiring the keepers of houses, where games of chance are played for money, to pay license therefor. The meaning of words and the grammatical construction of the English language, so far as established by rules and usages of language, are matters of law to be construed by the court. Only when words are used in a peculiar and unusual signification is testimony admissible for explanation. *Kennon v. King*, 437.

GARNISHMENT.

Effect of. A garnishment makes the garnishee a trustee of the money due the defendant for the benefit of the plaintiff in the attachment suit. *Perkins v. Guy*, 15.

See **ATTACHMENT.**

GOVERNOR.

Mandamus issued to. This court can compel the governor of the Territory, by its writ of mandate, to perform the ministerial act of canvassing the vote upon the law known as the "Capital Law." *Chumaseo v. Potts*, 242.

HIGHWAY.

Obstruction of. See INDICTMENT.

Usurpation—failure to repair. See FRANCHISE.

HUSBAND AND WIFE.

1. *Married women—descent of property.* The wife of G. owned, as her separate property, a judgment which she recovered against B. This action was commenced after her decease. *Held*, that the property descended to her kindred, and that G. is not entitled to the same until her estate has been administered upon and settled. *Boley v. Griswold*, 447.
 2. *Case affirmed.* The case of *Griswold v. Boley*, 1 Mon. 545, holding that the property of a married woman is freed from the debts of her husband, when her list of the same has been recorded according to law, affirmed. *Ib.*
 3. *Married woman's separate property.* Where a married woman has filed a list of her separate property, as required by law, it is not liable to seizure on execution against her husband. *Vantilburgh v. Hamilton*, 413.
- When wife of prisoner not admissible as witness in his behalf.* See EVIDENCE.

INDEMNITY.

Action on mortgage given as—basis of action. In foreclosing a mortgage given to indemnify sureties on notes, for moneys paid by such sureties, the notes themselves should not be made the basis of the action, but money paid for the use of the makers of the notes. *Collier v. Ervin*, 335.

INDIAN AGENT.

See EMBEZZLEMENT; EVIDENCE, 3.

INDIAN COUNTRY.

Transportation of liquor. Citizens of the United States, and those who have declared their intention to become such, have the right to carry spirituous liquors through the Indian country for the purpose of lawfully selling the same in other places. *United States v. Carr*, 234.

INDICTMENT.

1. *Allegation of crime in indictment.* Under the Criminal Practice Act of the Territory, an indictment is sufficient which alleges clearly a crime, and notifies the accused of the act which is complained of; and the highest degree of certainty is not required. *Territory v. Ashby*, 89.
2. *Description of alley in indictment for obstructing highway.* An indictment contains a sufficient description of a public alley, which alleges that there was, in Helena, an ancient highway, known as — alley, in a certain block leading from thence to Rodney street, and that the accused erected a fence across said alley, near the west end of said Rodney street, and continued the same a certain time. *Ib.*
3. *Obstruction of highways—joinder of offenses.* An indictment, which alleges that a party obstructed a public alley by the erection of a fence upon a certain date, and continued to maintain the same thereafter, does not state two offenses that cannot be joined. *Ib.*
4. *Allegation of time in indictment under different statutes.* An indictment, which alleges that the accused obstructed a highway from June 21, 1872, to November 2, 1872, is not invalidated by the repeal of the old law defining the offense and the passage of a new law relating thereto on August 1, 1872. *Ib.*

INDICTMENT — *Continued.*

- 5 *Description of court.* The caption of the indictment in this case described the court as "the United States District Court of the Territory of Montana, for the Second Judicial District." *Held*, that there is no "United States District Court" in said Territory. *Held*, also, that the indictment is not vitiated by this erroneous description of the court, because the record accompanying the indictment shows that the same was found by a court having jurisdiction of the offense charged. *United States v. Upham*, 170.
- 6 *Indictment for conspiracy to defraud the United States.* Said indictment charged that three persons, an Indian agent, his clerk and a trader, conspired and agreed together to procure the goods of the United States, to be disposed of fraudulently for money, and thereby intended to cheat and defraud the United States. *Held*, that said indictment is good. *Ib.*

INDORSEMENT.

When a bill in equity can be maintained to compel. See CERTIFICATE OF DEPOSIT.

INJUNCTION.

1. *Measure of damage in action on undertaking — attorney fees.* In a suit on an undertaking given to procure a temporary injunction, the merits of which were never tried, no recovery could be had for attorney fees expended in the main to determine the title to the waters in dispute, and evidence offered for such purpose was properly excluded. The case of *Campbell v. Metcalf*, 1 Mon. 381, affirmed and applied. *Allport v. Kelley*, 343.
2. *Practice — application for temporary injunction — report of referee upon facts.* F. applied for an injunction, pending suit, to restrain C. from diverting water from a certain ditch. Under a rule of the district court, C. was ordered to show cause before a referee, who was appointed to take the testimony and report the facts. C. filed an answer, but did not offer any evidence, and moved to dissolve the temporary restraining order. The referee found that the testimony supported the material allegations of the complaint of F. No exceptions were taken to the findings, and the court dissolved the order. *Held*, that the motion of C. was irregular practice; that the facts reported by the referee had the effect of a special verdict; and that the court erred in ignoring the findings of the referee and dissolving the order. *Fabian v. Collins*, 510.
3. *Statutory construction — appointment of referee — injunction.* The two hundred and twenty-third, two hundred and twenty-fourth, two hundred and twenty-seventh and five hundred and eighty first sections of the Civil Practice Act confer upon the district courts the power to appoint a referee to take the testimony and report the facts, upon the application of a party for a temporary injunction. *Ib.*
4. *Nature of injunction.* Under the Civil Practice Act an application for a temporary injunction is a motion for an order. *Ib.*
5. *Facts on which a temporary injunction is granted.* The referee, appointed by the court in this proceeding, reported that F. is the owner and entitled to the use of the water described in the complaint; that C. has wrongfully diverted the same from F.; and that C. threatens to continue to divert said water. *Held*, that F. is entitled to an injunction pending suit. *Ib.*
6. *Not granted on application of a party who has not used diligence.* The wife of G. recovered her judgment against B., November 10, 1870. In this month B. filed a motion to retax the costs, which is pending, and also motions to revive two judgments against G., which are pending. About five years afterward, B. commenced this action, and prays for an injunction to restrain the sheriff from selling property to satisfy this judgment

INJUNCTION — *Continued.*

until these motions have been heard and determined. *Held*, that B. did not use reasonable diligence to secure the determination of his motions, and that he was not entitled to an injunction. *Held*, also, that B. has a legal remedy in the statutory proceedings supplementary to execution, if the judgments against G. are revived and G. receives from the officer the amount of the judgment against B. *Boley v. Griswold*, 447.

INSURANCE.

1. *Pleading — complaint upon insurance policy.* The complaint alleged substantially that defendant was a corporation; that plaintiff was owner of a certain building and goods therein of the value of \$20,000; that defendant, for a valuable consideration, insured plaintiff against loss by fire, and issued its policy, a copy of which is set forth in complaint; that the building and goods were totally destroyed by fire; that plaintiff furnished defendant with a statement and proof of his loss, and that plaintiff performed all the conditions of the policy, upon his part. Plaintiff prayed for \$5,000, the amount named in the policy. *Held*, that the complaint states facts sufficient to constitute a cause of action. *Daniels v. Andes Insurance Co.*, 78.
2. *Answer to complaint upon insurance policy.* The answer to the said complaint admitted that defendant executed the policy and had not paid the sum claimed; denied that plaintiff owned the building and goods; denied that the loss exceeded \$2,000; denied that plaintiff furnished proof of the loss; denied that plaintiff performed the conditions of the policy, and alleged that one Cutter was a part owner of the property; that plaintiff made false and fraudulent statements in his application for the insurance, and that the covenants and warranties of plaintiff formed a part of the consideration for said insurance. *Held*, that the answer is sufficient, and puts in issue the material facts alleged in the complaint. *Held*, also, that, under said pleadings, the plaintiff was required to prove the performance of the conditions of the contract upon his part. *Ib.*
3. *Insurance policy — examination of plaintiff.* In this action to recover under said pleadings upon a policy of insurance, the following question was propounded to plaintiff, upon his direct examination: "State whether or not you complied substantially with the conditions of the policy issued to you by the Andes Insurance Company, on the 1st of April last?" He answered, "I think I did; I did." The court refused to allow defendant to cross-examine plaintiff respecting the manner in which he performed each condition of said policy. *Held*, that the question was too general and leading, and that the only answer would be a conclusion of law. *Held*, also, that the court should have permitted said cross-examination of plaintiff by defendant. *Ib.*

INTEREST.

- On claims for labor.* The case of *Isaacs v. McAndrew*, 1 Mon. 437, holding that claims for labor do not bear interest, unless there has been unreasonable and vexatious delay, affirmed. *Ruff v. Rader*, 211.

INTERPLEADER.

- No remedy in case stated.* R. recovered a judgment against P. for \$181, November 1, 1871. Certain creditors of R. sued him on the following day, and served upon P. a writ of attachment, and notified P. not to pay the judgment to R. Afterward it caused an execution to be issued and levied upon the property of P. to satisfy his judgment. The said creditors subsequently obtained judgments against R., and were seeking to enforce their attachments upon said judgment against P., when P. filed a bill of inter

INTERPLEADER — *Continued.*

pleader against R. and the creditors. *Held*, that the creditors of R. could not attach his judgment against P., and that P. could not maintain his action of interpleader. *Perkins v. Guy*, 15.

INTERPRETATION.

See STATUTORY CONSTRUCTION.

INTOXICATING LIQUOR.

See LIQUOR.

JUDGMENT.

1. *Affirmance of judgment is void without legal appeal.* The affirmance of a judgment by this court is void for want of jurisdiction, if the plaintiff obtains the same by mistake or fraud, and perfects the appeal without the knowledge of the defendant, who had abandoned his appeal after filing the notice and undertaking therefor in the court below. *Harvey v. Whitlatch*, 55.
2. *Judgment vacated on motion.* A void judgment can be set aside by this court upon a motion made at a term subsequent to that in which it has been entered. *Ib.*
3. *Effect of judgments of this court until reversed.* The opinion of this court in affirming the judgment of the court below, in granting a new trial, is the law of the case until it is reversed by a higher tribunal. *Creighton v. Hershfield*, 169.
4. *Motion for judgment.* The practice of filing a motion for judgment, after a verdict has been recorded by the clerk, is not required by the Civil Practice Act, and therefore unauthorized. *Froner v. Rodgers*, 179.
5. *Judgment must follow verdict.* In this action in the nature of ejectment, the plaintiffs claimed two quartz lodes, alleged to be fifteen hundred feet in length and six hundred feet in width. The jury returned this verdict: "We, the jury, find for the plaintiffs, and allow and find for them only fifty feet on each side of said lodes. No damages allowed." *Held*, that the judgment must follow this general verdict. *Ib.*
6. *Stay of execution — judgment.* No part of the judgment can be executed if the proper undertaking to stay the execution has been given. *Plaisted v. Nowlan*, 359.
7. *Evidence — jurisdiction — indefiniteness — representations.* On an appeal from a judgment alone, when there was no motion for a new trial, the appellate court cannot review the evidence upon which the court below based its findings. *Vantilburgh v. Black*, 371.
8. *Cannot be attacked collaterally.* The judgment of a court having jurisdiction of the parties and the subject-matter is not void and cannot be attacked collaterally. *Ib.*
9. Judgment in a lien case is not void through indefiniteness of description of the property subject to such lien, and cannot be attacked therefor collaterally. *Ib.*
10. A judgment will not be disturbed on the ground of representations made by mortgagee at the former lien sale, the same being true in fact. *Ib.*
11. *When appellate court will not reverse.* Where there is evidence to support the findings of a court, or the verdict of a jury, the appellate court will not reverse a judgment based thereon. *Ming v. Truett*, 1 Mon. 322, and *Grasgold v. Boley*, *id.* 545, affirmed. *Vantilburgh v. Hamilton*, 413.
12. *Error no injury.* A judgment will not be reversed when the instructions contain error, if no injury has been done. *Parthen v. Peck*, 567.
13. *Effect of ruling requiring replication — separate trial.* T. brought this action

JUDGMENT—*Continued.*

tion against four persons to obtain an injunction and recover damages for the diversion of water. H. answered separately and set up title to the water, and the other parties filed a general denial. The court overruled T.'s motion to strike out part of H.'s answer, and ordered T. to reply thereto, and allowed H. a separate trial. T. refused to offer any evidence when the cause was called for trial, and judgment was entered for H. for his costs. *Held*, that the ruling upon the motion and replication did not injure T., and that the court properly exercised its discretion in granting H. a separate trial. *Townesley v. Hornbuckle*, 580.

Attachment of. See ATTACHMENT.

See CIVIL ACTION.

JURISDICTION.

1. *Appearance by demurrer.* This action was commenced in the district court of the Territory, and the respondents filed a general demurrer to the complaint of the appellant. *Held*, that the court thereby acquired jurisdiction of the parties. *McKiernan v. King*, 72.
2. *Jurisdiction of bankruptcy matters.* The act of congress, establishing a uniform system of bankruptcy throughout the United States, approved March 2, 1867, does not confer upon the district and circuit courts of the United States exclusive jurisdiction in all proceedings in bankruptcy. *Ib.*
3. *Suit by assignee.* The district courts of the Territory have jurisdiction to hear and determine actions brought by the assignee of a bankrupt to recover the possession or value of property, from one who has received the same in violation of said act. *Ib.*
4. *Of district court—jurisdiction and practice.* The Organic Act of Montana Territory, approved May 26, 1864, confers upon the district courts of the Territory the jurisdiction and practice of the district and circuit courts of the United States in cases arising under the constitution and laws of the United States. *United States v. Upham*, 113.
5. *Case affirmed.* The case of *Wilson v. Davis*, 1 Mon. 98, holding that the consent of parties cannot confer jurisdiction upon this court, affirmed. *Rader v. Nottingham*, 157.
6. *Mandamus issued by common-law courts.* The power to issue the writ of mandate is a branch of the common law, and any court, on which common-law jurisdiction has been conferred, is authorized to issue the writ. *Chumaseo v. Potts*, 242.
7. *Jurisdiction of courts regulated by legislature.* The ninth section of the Organic Act, approved May 26, 1864, confers upon the legislative assembly the power to define the jurisdiction of the courts of the Territory, subject to the limitations specified therein. *Ib.*
8. *Jurisdiction in mandamus.* The grant of common-law jurisdiction, by said Organic Act, upon the supreme court carries with it jurisdiction in mandamus, which cannot be taken away by the legislative assembly. *Ib.*
9. *Jurisdiction of courts.* Said Organic Act confers upon the district and supreme courts appellate and original jurisdiction. *Ib.*
10. *Jurisdiction of mandamus.* The legislative assembly of the Territory has conferred rightfully upon the supreme court, original jurisdiction to issue the writ of mandate. *Ib.*
11. *Appeal—notice of—no appeal from part of a judgment.* The notice of appeal controls the jurisdiction of the appellate court. The sections of the statute conferring jurisdiction must control that which provides how an appeal shall be taken. An appeal from only a portion of a decree or final judgment is not authorized by statute, and cannot be entertained. The appellate court must have jurisdiction of the whole of a judgment to review any portion thereof; the modification of one portion might require the modification of the whole. *Barkley v. Logan*, 296.

JURISDICTION — *Continued.*

12. *Appeal from probate court.* The district court cannot acquire jurisdiction of an action that has been appealed from the probate court, unless all the papers belonging thereto and a transcript of all the proceedings in the probate court are transmitted to the clerk of the district court. *Howard v. Quinn*, 339.
13. *Amount of costs.* The amount of the costs forms no part of the matter in dispute when questions of jurisdiction are considered. *Payne v. Davis*, 381.
14. *Act restricting appeal void.* The six hundred and seventeenth section of the Civil Practice Act, which provides that the supreme court shall have jurisdiction in civil cases, "where the amount in dispute exceeds \$100," is inconsistent with the ninth section of the Organic Act of the Territory, which allows appeals "in all cases from the final decisions" of the district courts. *Ib.*
15. *District court — powers — limitations — case affirmed.* The Organic Act that confers upon the district courts common-law and chancery jurisdiction, and also the jurisdiction exercised by the United States circuit and district courts, provides that this jurisdiction, in all alike, shall be as limited by law. This limitation may extend to the *mode* of exercising this jurisdiction, and applies to all branches of that jurisdiction. Case of *Gallagher v. Basey*, 1 Mon. 457, affirmed. *United States v. Ensign*, 396.
16. *Appeal — filing and service of notice.* This court does not have jurisdiction of an appeal in which a copy of the notice was served the day before the notice was filed in the district court. *Courtright v. Perkins*, 404.
17. *Of non-residents — publication of summons — proof of service.* H. commenced this action in Meagher county against C., a resident of the State of New York. On the application of H. the court made an order requiring the publication of the summons, and that copies of the complaint and summons be deposited in the post-office and directed to C. at his place of residence. The summons was published, but no affidavit was filed showing that said copies had been deposited in the post-office. *Held*, that the order of the court was legal under the forty-first section of the Civil Practice Act, and must be complied with before C. can be compelled to answer the complaint. *Held*, also, that affidavits showing that the order has been followed strictly, are necessary to prove the service of the summons. *Held*, also, that the court did not acquire jurisdiction of C. *Haase v. Corbin*, 409.
18. *Attachment — answer and discharge of garnishees.* In this action a writ of attachment was served on certain persons, who answered that they had no goods or credits belonging to C. The answers were not contradicted and no property of C. was found in the Territory. The action was dismissed on the ground that the court did not have jurisdiction of C., or the garnishees, and the garnishees were discharged. *Held*, that the answers of the garnishees must be considered true and that the ruling of the court was correct. *Ib.*
19. *Voluntary appearance — presumption — waiver.* Residence or service of summons is not necessary to confer jurisdiction over the person of defendant, where there is a voluntary appearance and answer. The district courts of the Territory are courts of general jurisdiction, and unless the contrary affirmatively appears, jurisdiction will be presumed, and appearance and answer waive all objections on the score of non-residence or non-service of summons. *Stephens v. Hartley*, 504.
20. *Of offense of assault and battery.* The legislative assembly conferred upon the district court "jurisdiction of all offenses not cognizable in the probate or justice of the peace courts." F. was indicted at a term of the district court for the statutory crime of assault and battery, which was within the jurisdiction of the probate court. A demurrer to the indict-

JURISDICTION — *Continued.*

ment on the ground that the court had no jurisdiction was sustained. *Held*, that the district court, notwithstanding this statute, had jurisdiction of the crime under the ninth section of the Organic Act of the Territory, which confers upon it "common-law jurisdiction." *Territory v. Flowers*, 531.

21. "*Common-law jurisdiction*" defined. Said clause, "common-law jurisdiction," refers to the right to hear and determine every case at law, excepting suits in equity and admiralty, and matters in courts-martial, and embraces criminal actions which are cases at law. *Ib.*
22. *Concurrent jurisdiction of crimes.* The second section of the amendment to the Organic Act, approved March 2, 1867, which confers upon the probate court jurisdiction of certain "criminal cases," does not deprive the district court of its jurisdiction of the same. The jurisdictions in these cases are concurrent. *Ib.*
23. *Rule for determining jurisdiction of courts.* The jurisdiction of the courts created by the Organic Act is determined by referring to said act, the statutes of the Territory, and the general history of jurisprudence throughout the United States. *Ib.*

See APPEAL, 7, 8, 19, 21, 36.

JURY.

1. *Peremptory challenges.* A party who has been indicted for grand larceny and receiving stolen goods, in violation of the laws of the United States, is entitled to three peremptory challenges to the jury impaneled to try the case, under chapter 333, acts 42d congress, approved June 8, 1872. *United States v. Upham*, 113.
2. *Bias of juror—verdict set aside.* A person who has talked about the "Indian agency cases," and evinced bias generally in such cases, is not competent to serve as a juror upon the trial of said Indian agent for conspiring with others to defraud the United States; and a verdict of guilty returned by the jury (of which he was a member) in this case must be set aside. *Id.* 170.
3. *Jurors forming opinions guilty of contempt.* Persons who have been summoned to attend court as jurors commit a contempt of court by talking with litigants and forming an opinion upon the merits of their cases. *Ruff v. Rader*, 211.
4. *Facts rendering a juror incompetent.* A juror testifies, when examined respecting his qualifications to serve, that he has formed an opinion concerning the merits of a case by talking with one of the parties and believing what he said regarding it; that he cannot say that it is an unqualified opinion; that sufficient evidence would change his opinion; that he thinks he can render an impartial verdict, and that his opinion is dependent upon the truth of what he had heard. *Held*, that said juror is not competent to sit in the trial of the case. *Ib.*
5. *An "unqualified opinion" by jurors.* A juror who hears and accepts as true the statement of a case by a party or witness forms an "unqualified opinion" within the meaning of the 198th section of the Civil Practice Act. *Ib.*
6. *Jury trial in mandamus.* Under the Civil Practice Act, a party to the proceedings in mandamus does not have the absolute right to a trial of the facts by a jury, and courts can exercise their discretion respecting the mode of trial. *Chumaseero v. Potts*, 242.
7. *Act of congress relating to trial by jury construed—mandamus proceedings.* The act of Congress, entitled "An act concerning the practice in Territorial courts, and appeals therefrom," approved April 7, 1874 (18 U. S. Sts. 27), contains this clause: "Provided, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common

JURY — Continued.

- law." *Held*, that the term, "cases cognizable at common law," does not include proceedings in mandamus. *Ib.*
8. *Granting a trial by jury.* The discretion of courts in awarding or refusing a jury in proceedings in mandamus will be governed by the manner in which material issues have been presented; the condition of the public mind in the district in which the court is held; the interests at stake; the difficulty in procuring jurors from a disinterested section, and the delay resulting from the trial of the issues in another court. *Ib.*
9. *In common-law courts.* Courts which have common-law jurisdiction can impanel a jury and receive a verdict, in the absence of a statute providing for the same. *Ib.*

LARCENY.

What constitutes — intent. It is error to charge the jury that simply killing an ox with another party, knowing the ox was not the property of that other party, but that it belonged to a third party, amounts to larceny, without adding thereto, "with a view of converting it to his own use, or of permanently depriving the owner thereof." The error is not cured, though elsewhere in the charge larceny is correctly defined. *Territory v. Paul*, 314.

LICENSE.

Ownership — license to enter inclosed field. At the trial plaintiff testified that the property in question belonged to him, and was in his inclosed field when taken wrongfully. Defendant offered evidence to prove that plaintiff agreed to and did sell to him the property, and that under this agreement he entered the field and took the property. The evidence was rejected. *Held*, that the evidence relating to the ownership should have been admitted, and that, under said denial, the evidence relating to the privilege to enter the premises was properly excluded. *Steinbach v. Rexford*, 565.

LIEN.

See **MECHANICS' LIEN.**

LIMITATION.

1. *General and special provisions.* The general law of limitation of actions for the recovery of real estate is limited by special provisions applicable to placer mines and quartz lodes. The specific and not the general law must control such cases. *Davis v. Clark*, 310.
2. *Statute of construction — ejectment — quartz lodes.* The amendments to the statute of limitations, approved January 11, 1872, changed the order and character of the evidence in actions for the recovery of claims upon quartz lodes; and the plaintiff must show that he was in the actual possession of the same within one year next before the commencement of the action. *Id.* 394.

LIQUOR.

Indian country — transportation of liquor through. Citizens of the United States, and those who have declared their intention to become such, have the right to carry spirituous liquors through the Indian country for the purpose of lawfully selling the same in other places. *United States v. Carr*, 234.

MANDAMUS.

1. *Mandamus issued by common-law courts.* The power to issue the writ of mandate is a branch of the common law, and any court, on which common

MANDAMUS — *Continued.*

law jurisdiction has been conferred, is authorized to issue the writ. *Chumasco v. Potts*, 242.

2. *Jurisdiction of courts regulated by legislature.* The ninth section of the Organic Act, approved May 26, 1864, confers upon the legislative assembly the power to define the jurisdiction of the courts of the Territory, subject to the limitations specified therein. *Ib.*
3. *Jurisdiction in mandamus.* The grant of common-law jurisdiction, by said Organic Act, upon the supreme court carries with it jurisdiction in mandamus, which cannot be taken away by the legislative assembly. *Ib.*
4. *Jurisdiction of courts.* Said Organic Act confers upon the district and supreme courts appellate and original jurisdiction. *Ib.*
5. *Jury in common-law courts.* Courts which have common-law jurisdiction can impanel a jury and receive a verdict, in the absence of a statute providing for the same. *Ib.*
6. *Petitioners for mandamus.* Any citizen of the Territory may be the relator in an application for a writ of mandate, when the subject-matter relates to the validity of an election. *Ib.*
7. *Duty of Territorial canvassers.* Under the laws of the Territory, the governor, secretary and marshal of Montana must act together in canvassing the votes upon "An act to change the seat of government of the Territory of Montana," "known as the Capital Law," approved February 11, 1874. *Ib.*
8. *No demand for performance of public duty.* The writ of mandate can be issued against Federal officers, that have failed to perform a duty of a public nature, imposed upon them by the legislative assembly, when no demand for the performance thereof has been made. *Ib.*
9. *Mandamus issued to the governor.* This court can compel the governor of the Territory, by its writ of mandate, to perform the ministerial act of canvassing the vote upon said Capital Law. *Ib.*
11. *Duties of Federal officers.* The legislative assembly can require the Federal officers of the Territory to perform duties, which are not enumerated in said Organic Act. *Ib.*
12. *Pleading about legal remedy.* The application for a writ of mandate need not allege that the petitioner has no plain, speedy and adequate remedy at law. *Ib.*
13. *Jurisdiction of mandamus.* The legislative assembly of the Territory has conferred rightfully upon the supreme court, original jurisdiction to issue the writ of mandate. *Ib.*
14. *Elector who is "beneficially interested."* An elector of the Territory is "beneficially interested" in legal proceedings to compel its officers to perform their duties, and is the proper party to apply for the writ of mandate to secure this result. *Ib.*
15. *Remedy of mandamus.* Mandamus affords the only remedy to the citizen who seeks to compel an officer to perform his duty to the public. *Ib.*
16. *Certificate of canvassers.* The certificate of the Territorial canvassing board, upon the vote for the approval of the Capital Law, is *prima facie* evidence of the legal vote cast at the general election; and the members of the board have no right to go behind the abstracts of the votes returned to it. *Ib.*
17. *Jury trial in mandamus.* Under the Civil Practice Act, a party to the proceedings in mandamus does not have the absolute right to a trial of the facts by a jury, and courts can exercise their discretion respecting the mode of trial. *Ib.*
18. *Nature of mandamus proceedings.* A proceeding in mandamus is not a case at common law, or a civil action under the Civil Practice Act. *Ib.*
19. *Act of congress relating to trial by jury construed — mandamus proceedings.* The act of congress, entitled "An act concerning the practice in Territorial courts, and appeals therefrom," approved April 7, 1874 (18 U. S. Sts. 27)

MANDAMUS — *Continued.*

- contains this clause: "*Provided*, that no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law." *Held*, that the term, "cases cognizable at common law," does not include proceedings in mandamus. *Ib.*
20. *Case doubted.* The case of *People v. Pacheco*, 29 Cal. 210, holding that a proceeding in mandamus must be prosecuted in the name of the real party in interest, and that it could not be prosecuted in the name of the State, doubted. *Ib.*
21. *Granting a trial by jury.* The discretion of courts in awarding or refusing a jury in proceedings in mandamus will be governed by the manner in which material issues have been presented; the condition of the public mind in the district in which the court is held; the interests at stake; the difficulty in procuring jurors from a disinterested section; and the delay resulting from the trial of the issues in another court. *Ib.*
22. *To Territorial auditor.* F. printed copies of said list of marks and brands under a contract with said recorder. The Territorial auditor, after demand, refused to issue a warrant for the payment of said services. F. applied for a writ of mandate, and the answer of the auditor admitted the facts stated in the application, and alleged two reasons for his refusal: that the law did not fix a certain compensation for the services, and that the auditor had no jurisdiction to determine the value thereof. The court issued the peremptory writ and commanded the auditor to issue the warrant. *Held*, that the writ was properly issued. *Fisk v. Cuthbert*, 593.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

When declarations of servant bind master. See CARRIER, 1.

MECHANICS' LIENS.

1. *Statutory construction — act securing mechanics' liens constitutional.* The act of the legislative assembly, approved January 12, 1872 (Cod. Sts., chapter 40), secures liens to mechanics for their labor, and confers upon the district court chancery jurisdiction to determine the rights and priorities of the liens of mechanics and mortgagees. The 6th section of the Organic Act of the Territory provides "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act." *Held*, that said act of the legislative assembly is constitutional. *Held*, also, that said act secures a lien to a mechanic for work which has not been performed under any contract. *Alvord v. Hendrie*, 115.
2. *Upon quartz lode and mill.* A. made a contract with H. to perform labor at the rate of \$2,500 per annum, and work one-half of his time upon H.'s quartz lode, and the other half upon H.'s mill, in which the quartz taken from the lode was to be worked. *Held*, that A. can secure payment for said labor by filing and enforcing in the same action one lien upon the lode and mill, or two separate liens upon said property. *Ib.*
3. *Time for filing lien by A. for said labor.* The time during which A. was to perform said labor for H. was not stated in said contract, and A. worked under it 21 months. The 6th section of said act of the legislative assembly makes it the duty of a person, wishing to avail himself of the said act, to file with the county recorder, within sixty days after said labor shall have been performed, an account of his demand. *Held*, that A. was not required to file said account within sixty days after the end of the first

MECHANICS' LIENS — Continued.

- year to secure a lien for the sum then due from H. under said contract
Ib.
4. *Estoppel.* The doctrine of estoppel does not apply to prevent a mortgagee from purchasing the mortgaged premises or a portion thereof, when sold under the foreclosure of mechanic's liens, nor to prevent his taking possession of such premises under a writ of assistance, when the time of redemption under such sale has expired, nor are the rights thus acquired lost or merged in his subsequent foreclosure of his mortgage. *Vantilburgh v. Black*, 371.
 5. *Judgment — attacking collaterally.* Judgment in a lien case is not void through indefiniteness of description of the property subject to such lien, and cannot be attacked therefor collaterally. Ib.
 6. —. A judgment will not be disturbed on the ground of representations made by mortgagee at the former lien sale, the same being true in fact. Ib.
 7. *General agent or superintendent not entitled to.* A claim of a mechanic's lien against the buildings, machinery and mining ground of a corporation by one who alleges himself to have been employed as agent, manager and superintendent of said corporation, at a certain monthly salary, in the erection of buildings and working of mines, does not come within the spirit or letter of the mechanic's lien law of Montana. The superintendent of a corporation stands in the place of the corporation itself toward others intended to be protected by the law. *Quere* as to the validity of a joint lien upon separate and distinct parcels of property. *Smallhouse v. Kentucky and M. G. and S. M. Co.*, 443.

MILITIA VOUCHERS.

Not negotiable — statutory prohibition — how transferred — not forfeited. Claims against the United States, such as the so-called Montana Militia vouchers, are not negotiable paper, that can be transferred by mere delivery. The statutes of the United States (see Rev. Sts. of the U. S., p. 693, § 3477) expressly prohibit it, and no custom to the contrary is entitled to be heard in evidence. Parties receiving such vouchers from a person not legally entitled to them, or authorized to dispose of the same for the lawful owner, and without the formalities that the law requires, can acquire no title thereto, but are rightly chargeable with a knowledge of the statute, and the lawful owner does not lose his right thereto by neglect to enjoin the transfer of the same. *Creighton v. Black*, 354.

MINES AND MINERAL LANDS.

1. *Power of congress and legislature.* Congress, by the acts relating to the mineral land of the public domain, approved July 26, 1866, July 9, 1870, and May 10, 1872, has recognized the authority of the legislative assembly of the Territory and miners of districts to enact laws regulating the extent of mining claims, which can be located, and the manner of working and developing the same, and appropriating the minerals therein contained. But the power to control and dispose of said land has been conferred upon congress by the constitution, and cannot be delegated to said assembly. *Territory v. Lee*, 124.
2. *Act concerning aliens holding same, adjudged void.* The Territory has no right or title to the unappropriated mineral land within its boundaries. The act of the legislative assembly concerning mines held by aliens, approved January 12, 1872 (ch. 82, Cod. Sts. 593), which provides "for the forfeiture to the Territory of placer mines held by aliens," interferes with the primary disposal of the public domain within the Territory, and is, therefore, inconsistent with the sixth section of said Organic Act, and void. Ib.

MINES AND MINERAL LANDS — *Continued.*

3. *Power of Territorial governments — sovereignty.* The Territory has none of the essential attributes of sovereignty, and is a province, over which congress exercises supreme control. The laws of the legislative assembly can be repealed by congress, and the Territorial courts have no final jurisdiction in cases in which the amount in controversy exceeds \$1,000. The authority to enact laws for the forfeiture of mineral public lands is a prerogative of sovereignty, and cannot be exercised by said assembly. *Ib.*
4. *Right of citizens and aliens to mineral land.* Said act of congress, approved July 26, 1866, gives to citizens, and those who have declared their intention to become citizens, the right to enter upon, explore and possess the mineral lands of the United States, and excludes therefrom the Territory, aliens and all others. *Held*, that this act does not authorize the forfeiture of the title of aliens to said land. *Held*, also, that aliens can hold and enjoy the possessory title to said lands within the Territory. *Ib.*
5. *Proof of mining rules — examination of, by jury.* A book containing the rules and regulations of the miners of the district, in which the mineral land in controversy in this action was located, was competent evidence under the 504th section of the Civil Practice Act, and the jury had the right, under the 207th section of the Civil Practice Act, to take said book to their room, upon retiring for deliberation. *Orr v. Haskell*, 225.
6. *Width of lead — point of measurement.* The proper construction of the act of the Montana legislature, December 26, 1864, contained in the Codified Statutes, 522, § 3, is that the measurement of the fifty feet on either side of the *lead*, allowed for working purposes, should begin from the outer walls of the *lead*, on each side, and not from the center of the *lead* itself. *Foote v. National Mining Co.*, 402.
7. *Statutory construction — act relating to mining claims — record of discovery.* At the trial of this action to determine the right to the possession of certain placer mining ground, M. offered evidence to prove that he made and filed, in the office of the county recorder, a statement of his discovery of the ground. The statute, approved May 8, 1873, provides that this statement shall be made and filed when "any mining claim upon any vein or lode bearing * * * valuable deposits" is discovered. *Held*, that a vein or lode bearing valuable deposits does not include a placer mining claim, and that the discoverer of placer mining ground is not required, by the laws of the Territory, to make or file for record a statement of its discovery. *Held*, also, that the evidence is inadmissible. *Moxon v. Wilkinson*, 421.
8. *Evidence of possession of mineral land.* To prove a right to the possession of said ground, M. offered evidence to prove that he dug a ditch after the filing of his adverse claim in the land office, to mine the ground, and that he occupied a dwelling-house and blacksmith shop upon the ground. *Held*, that the evidence is not admissible, and does not tend to prove that M. possessed the ground as a miner or that it is mineral land. *Ib.*

See WATER RIGHT.

MISJOINDER.

Only a party improperly joined can take advantage of it. *Territory v. Hildebrand*, 426.

Of parties. See DEMURRER; PLEADING, 14, 28.

MISTAKES OF LAW.

Facts when relief is granted against mistake in law. C. obtained a decree for the foreclosure of a mortgage upon certain mining ground of F., E. and M.; F. paid to C. one-half of the judgment and C. released to him one-half of the mining ground described in the decree, E. and M. agreed

MISTAKES OF LAW — *Continued.*

orally, that the release of F. should not affect their liability under the decree; the agreement, which an attorney was employed to reduce to writing, in legal effect, through a mistake or ignorance of the law by the writer released F., E. and M. *Held*, that the release to E. and M. should be set aside, and that E. and M. cannot in good conscience retain the advantage acquired under the written agreement. *Collier v. Field*, 205.

MORTGAGE.

1. *Foreclosure — decree — errors of law — several foreclosures sought — amount due on each — priority — sale of property.* Errors of law need not be set forth as specifically as those of fact. When the foreclosure of several mortgages is sought, and embraced in a single action, the decree should find the amount due on each, the priority or order in which each is to be paid, and only such property as is embraced in a particular mortgage should be sold to satisfy the debt secured thereby. *Collier v. Ervin*, 335.
2. *Indemnity — basis of action.* In foreclosing a mortgage given to indemnify sureties on notes, for moneys paid by such sureties, the notes themselves should not be made the basis of the action, but money paid for the use of the makers of the notes. *Ib.*
3. *Judgment for deficiency — docketing, a ministerial act — its purpose.* A ruling in the case, 1 Mon. 639, to the effect that a deficiency judgment should be provided for in the decree and afterward entered and docketed in order to sustain an action on an undertaking to pay any deficiency on sale of mortgaged premises, given on appeal, is also overruled. That decision was based on the case of *Orchard v. Hughes*, 1 Wall. 77, and on rule 96 of the United States supreme court, of which the former was reversed and the latter became inoperative. The law requires a deficiency on the sale of mortgaged premises to be docketed, to become a lien and notify third parties. A decree need not contain what the law requires to be done without it, and the act of the clerk in such cases is in no sense a judgment, nor is it final or decisive. *Creighton v. Hershfield*, 386.
4. *"Now growing and standing" grain.* K. mortgaged to F. certain oats, etc., "now growing and standing" in a field, August 12, 1871. On the following day S., the sheriff, levied upon the property under a writ of attachment in favor of a creditor of K., and afterward sold it under an execution. On August 12, 1871, the grain had been cut, and one-half of it had been threshed before the officer levied thereon. *Held*, that the mortgage does not include, as against third parties, the grain which had been cut or threshed. *Held*, also, that the expression, "now growing and standing," describes the condition of the cereals when they are nourished and supported by the earth. *Ford v. Sutherland*, 440.

See BANKRUPT LAW; STATUTE OF FRAUD.

MUNICIPAL CORPORATION.

1. *County funds.* Money can only be drawn from the treasury of a county in pursuance of the statute. *Johnston v. Lewis and Clarke County*, 159.
2. *Power of legislature to create county indebtedness for roads.* The legislative assembly enacted a statute, approved February 11, 1876, which authorized and required the commissioners of Deer Lodge county to issue county warrants to certain persons to reimburse them for constructing a wagon road in the county. The road was a public highway, on which the people of the county are accustomed to travel. A part of the expense of its construction has been paid by private subscription, but the remainder is unpaid. *Held*, that the road has been constructed for a municipal purpose and is beneficial to the people of the county, and that the statute is upon a rightful subject of legislation. *Wilcox v. Deer Lodge County*, 574.

MURDER.

- 1 *Degrees—indictment.* The statutes of Montana (Cod. Sts. 273, § 21) make murder to consist of two degrees. The killing of a human being with malice aforethought, by means of poison, lying in wait, torture, or other willful, deliberate or premeditated means, or in the perpetration or the attempt to perpetrate arson, rape, robbery or burglary, is murder of the *first* degree. All other cases of killing with malice aforethought, express or implied, are murder of the *second* degree. The form of the indictment may be the same in both cases, and the *degree* of the offense is to be determined by the evidence of deliberation, premeditation, torture, etc. *Territory v. Stears*, 324.
2. *Verdict must find degree.* The verdict of the jury alone, without reference to the indictment, judge's charge, or record of the evidence, must designate and express the degree of the offense, as well as the guilt. It is not enough to find one guilty as charged in the indictment, though the indictment may clearly charge the offense in the *first* degree. The jury alone must find the degree of the offense from the evidence, and designate it in their verdict. A failure to do so vitiates the verdict and nullifies any judgment based thereon. *Ib.*

NAME.

Pleading—christian names of parties in complaint. The respondent, by the name of H. C. Wiebbold, commenced this action to foreclose a mortgage executed by the appellants. The appellants demurred to the complaint on the ground that the christian name of the respondent did not appear therein. The demurrer was overruled, and a judgment was entered for the respondent upon the failure of the appellants to answer. The forty-ninth section of the Civil Practice Act provides that the complaint shall contain "the name of the parties to the action, plaintiff and defendant." *Held*, that H. C. Wiebbold is not a legal name, and that the christian name of said Wiebbold must be stated in the complaint. *Held*, also, that the omission of the respondent to set forth in the complaint his christian name rendered the pleading defective for uncertainty, and the judgment entered thereon is void. *Wiebbold v. Hermann*, 609.

NEGLIGENCE.

1. *Of carrier of passengers—proof of negligence.* It appeared at the trial of an action against a carrier for damages sustained by a passenger, that defendant's driver had complete control of the sleigh, and the horses were traveling about six miles per hour over a good level road, when the sleigh turned suddenly on one side and threw R. from his seat, and thereby inflicted a personal injury. R. could not prove the cause of the accident, and did not contribute thereto, and was nonsuited. *Held*, that the proof of the occurrence of the accident and infliction of the injury established a *prima facie* case of negligence against G., and should have been submitted to the jury. *Ryan v. Gilmer*, 517.
2. *Contract of passenger carriers.* In the absence of a special contract, common carriers of passengers are required to carry passengers as safely as human foresight and reasonable care will permit. *Ib.*

NEGOTIABLE INSTRUMENT.

1. *Certificate of deposit—delivery—remedy for non-payment.* W., as agent for F., deposited money in a bank and took a certificate of deposit, payable to his own order, three months after date. W. delivered the certificate to F., but refused to make a written indorsement thereon to F., and the bank refused to pay F., the owner and holder. *Held*, that said certifi-

NEGOTIABLE INSTRUMENT — *Continued.*

cate is negotiable, and may be assigned by delivery without any writing. *Held*, also, that F. has a legal remedy against the bank, and cannot maintain a bill in equity to compel the payment of the certificate after W. has indorsed it. *Held*, also, that F. can maintain a bill in equity to compel W. to indorse said certificate to F. *Fultz v. Walters*, 165.

2. *Militia vouchers* — *not negotiable* — *statutory prohibition* — *how transferred* — *not forfeited*. Claims against the United States, such as the so-called Montana militia vouchers, are not negotiable paper that can be transferred by mere delivery. The statutes of the United States (see Rev. Sts. of the U. S., p. 693, § 3477) expressly prohibit it, and no custom to the contrary is entitled to be heard in evidence. Parties receiving such vouchers from a person not legally entitled to them, or authorized to dispose of the same for the lawful owner, and without the formalities that the law requires, can acquire no title thereto, but are rightly chargeable with a knowledge of the statute, and the lawful owner does not lose his right thereto by neglect to enjoin the transfer of the same. *Creighton v. Black*, 354.

NEW TRIAL.

1. *Grounds requiring affidavits*. A motion for a new trial for the causes of irregular proceedings, which prevented a new trial, and accident and surprise, will be refused if it is not made upon affidavits, as required by the 234th section of the Civil Practice Act. *Orr v. Haskell*, 225.
2. *Verdict against evidence*. A new trial will not be granted for the cause that the verdict is against the evidence, unless it appears clearly that the jury erred. *Ib.*
3. *Newly discovered evidence*. A new trial will not be granted on the score of evidence cumulative in its nature, and that might have been produced at the first trial. *Morse v. Swan*, 306.
4. *Statutory construction* — *new trial* — *statement of errors*. The amendments of the Civil Practice Act, approved February 13, 1874, require the party intending to move for a new trial to give "the points in writing, particularly specifying the grounds of such motion" *Held*, that the decisions of this court, holding that this party must specify the particulars in which the evidence is insufficient to justify the findings or judgment, and point out wherein the same are against law, have not been affected by these amendments. *Held*, also, that these amendments repealed the sections of the Civil Practice Act which required the preparation and settlement of a statement before the motion for a new trial could be heard. *Taylor v. Holter*, 476.
5. *Form and review of exceptions*. Said amendments will not allow this court to consider exceptions which have not been reduced to form and signed during the term, or noted by the clerk, unless counsel consent, or the judge orders that they be prepared in vacation. *Ib.*
6. *Effect of public interests*. This is an action between private persons, which affects the right of the public to use certain land as an alley, and the court filed findings of the facts. *Held*, that this court will not order any judgment to be entered upon the findings, and, therefore, grants a new trial. *Hall v. Ashby*, 489.
7. *Motion for* — *statement of evidence* — *exceptions*. This court will disregard a statement of the evidence on the motion for a new trial which has not been incorporated in a bill of exceptions. *Daniels v. Andes Insurance Co.*, 500.
8. *Cause remanded for further proceedings*. At the August term, 1875, this court reversed the judgment and remanded the cause for further proceedings. It appeared from the opinion that the court below tried two causes of action upon a wrong theory, and that certain errors must be corrected by the court below by determining the amounts due upon

NEW TRIAL — Continued.

three mortgages and their priorities. *Held*, that the errors arose upon the trial of the cause, and that the effect of the order of this court was to grant a new trial. *Collier v. Ervin*, 556.

9. *Appeal not considered.* Both parties appealed. C. asked for a new trial, and E. for a modification of the judgment. A new trial was granted on the hearing of C.'s appeal. *Held*, that E.'s appeal would not be considered because a modification of the judgment would be useless. *Ib.*

NOTICE OF APPEAL.

See **APPEAL.**

NUISANCE.

1. *Common-law offenses — in force.* Section 185 of the Criminal Laws of Montana provides that all offenses recognized by the common law as crimes, and not herein enumerated, shall be punishable, etc., and classifies such crimes as felony or misdemeanor. Section 6 of our Criminal Practice Act confers jurisdiction of such offenses upon district courts, and section 5 of same act provides that prosecution in such cases shall be by indictment. This statute is in force and should be given its full effect. *Territory v. Ye Wan*, 478.
2. *Interpretation — offenses.* The term *offenses*, as used in this statute, applies to certain acts and intentions, or acts and criminal negligence, and all such acts or omissions, as would constitute nuisance at common law, and are not enumerated in our statute, in section 147 of Criminal Law, are still indictable under section 185 of the same law. It is the act that constitutes the offense, and that is punishable, and it matters nothing what name is attached to it. *Ib.*
3. *Repeal — implication.* As to acts specified in said section 147, there can be no common-law nuisance, the statute having taken its place; but all other acts that constituted nuisance at common law, do so still under section 185. The common law is only so far repealed by implication, as the statute directly excludes it. *Ib.*

OFFICIAL BOND.

Liability of sureties — probate judge — breach of conditions. The failure of the probate judge to make the proper order on the final report of the administrator, and instead thereof, ordering said administrator to pay over the moneys belonging to the estate into the hands of the probate judge, is such a breach of the condition of the official bond, guaranteeing "a faithful performance of official duties," as to sustain an action by the lawful heirs against the sureties of the probate judge. Failure to do what the law requires, as well as doing what the law does not allow, is a breach of the bond. *Smith v. Lovell*, 332.

ORGANIC ACT.

See **STATUTORY CONSTRUCTION.**

PARTIES.

Non-joinder of. See **PLEADING**, 31.

PLEADING.

1. *Denials in answer.* The fifty-sixth section of the Civil Practice Act, approved January 12, 1872, provides that "the answer of the defendant shall

PLEADING — *Continued.*

- contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." *Held*, that this section does not embrace denials made upon information and belief. *Sands v. Maclay*, 35. (See *Cases Reversed, etc., ante.*)
2. *Affidavit of verification—denials.* The sixty-third section of the said act, which requires that "the affidavit of verification shall state, that the facts stated * * * are true * * * except as to those matters which are therein stated on" the "information and belief" of the affiant, does not modify said fifty-sixth section and authorize parties to make denials upon information and belief. *Ib.*
 3. *Judgment on pleadings for insufficient denials.* The denials of an answer which do not conform to the Civil Practice Act, raise no issue and thereby admit the facts stated in the complaint; and judgment may be entered thereon without striking out the answer. *Ib.*
 4. *Knowledge of party.* The court below must determine generally questions relating to the presumptive knowledge of facts by the party who states them in his pleadings. *Ib.*
 5. *Case affirmed.* The case of *Lomme v. Kintzing*, 1 Mon. 290, holding that a party may move for judgment when the answer raises no material issue, affirmed. *Ib.*
 6. *Complaint upon insurance policy.* The complaint alleged substantially that defendant was a corporation; that plaintiff was owner of a certain building and goods therein of the value of \$20,000; that defendant, for a valuable consideration, insured plaintiff against loss by fire, and issued its policy, a copy of which is set forth in complaint; that the building and goods were totally destroyed by fire; that plaintiff furnished defendant with a statement and proof of his loss, and that plaintiff performed all the conditions of the policy, upon his part. Plaintiff prayed for \$5,000, the amount named in the policy. *Held*, that the complaint states facts sufficient to constitute a cause of action. *Daniels v. Andes Insurance Co.*, 78.
 7. *Answer to complaint upon insurance policy.* The answer to the said complaint admitted that defendant executed the policy and had not paid the sum claimed; denied that plaintiff owned the building and goods; denied that the loss exceeded \$2,000; denied that plaintiff furnished proof of the loss; denied that plaintiff performed the conditions of the policy, and alleged that one Cutter was a part owner of the property; that plaintiff made false and fraudulent statements in his application for the insurance, and that the covenants and warranties of plaintiff formed a part of the consideration for said insurance. *Held*, that the answer is sufficient, and puts in issue the material facts alleged in the complaint. *Held*, also, that, under said pleadings, the plaintiff was required to prove the performance of the conditions of the contract upon his part. *Ib.*
 8. *Pleading under Civil Practice Act.* The Civil Practice Act has abolished the rule of the common law, which construed a pleading against the pleader, and requires parties to state only the ultimate facts upon which they rely, in ordinary and concise language, and without repetition. *Ib.*
 9. *Defective pleadings and verdict.* Defects in pleadings, which are cured by the verdict, cannot be taken advantage of in this court. *Ib.*
 10. *Sufficiency of complaint.* This court can inquire at any time into the sufficiency of the complaint to support the judgment which has been entered thereon. *Territory ex rel. Blake v. Virginia Road Co.*, 96.
 11. *Complaint in actions for usurpation of a franchise.* In this action the complaint alleged that defendant, for more than three years, used certain franchises, which were specified; that defendant, during this time, usurped said franchises; that defendant claims the right to use said franchises under an act of the legislative assembly of the Territory, entitled "An act to incorporate the Virginia City and Summit City Wagon Road Company," approved January 27, 1865; that said right of defendant was with-

PLEADING — *Continued.*

- out warrant, grant or charter, and that defendant had forfeited said right by its failure to comply with said act, and maintain and keep in repair its toll-road. *Held*, that this complaint is sufficient at common law and under the Civil Practice Act. *Ib.*
12. *Allegation of incorporation.* The sixty-first section of the Civil Practice Act, approved December 23, 1867, provided that "In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage, and the court shall thereupon take judicial notice thereof." *Held*, that said act of incorporation was made a part of said complaint by said reference, and the court must find that defendant is a corporation. *Held*, also, that said complaint should not contain any other allegation that defendant is a corporation. *Ib.*
 13. *Pleading in quo warranto and actions for usurpation.* The fifth chapter of the eighth title of the Civil Practice Act, approved December 23, 1867, which provides for actions for the usurpation of a franchise, is the same in effect as the common law relating to informations in the nature of *quo warranto*; and the sufficiency of a complaint for the usurpation of a franchise is determined by the rules of the common law. *Ib.*
 14. *Demurrer for misjoinder.* A demurrer for the misjoinder of parties defendant, which does not show wherein there is such misjoinder, will be overruled. *Fultz v. Walters*, 165.
 15. *Demurrer for want of equity.* A demurrer upon the ground that the complaint does not show sufficient equity to charge a party cannot be made under the specification that there is a misjoinder of parties. *Ib.*
 16. *In ejectment — proper allegations of complaint — sham denials.* The complaint in this case alleges that plaintiff is seized in fee and entitled to the immediate possession of a certain tract of land; that defendants are in the possession and withhold the same from the plaintiff, and that plaintiff has been damaged in the sum of \$300. The answer denies the right of the plaintiff to the possession, and the wrongful withholding of the property, and that plaintiff has been damaged. *Held*, that the complaint states a good cause of action; that the answer is sham and irrelevant, and that judgment was properly rendered for the plaintiff upon the pleadings. *McCauley v. Gilmer*, 202.
 17. *Practice — objection to answer after verdict.* After the verdict has been returned, a party cannot complain for the first time that the denials in the answer are insufficient. *Orr v. Haskell*, 225.
 18. *Complaint in action to set off judgments — liability of assignee with notice.* The complaint in this case alleges that C. obtained judgment against W. in July, 1868, for \$5,000 for personal injuries; that W. obtained judgment upon a promissory note against C. in October, 1868, for \$2,673, which is unpaid; that W. paid C. one-half of his judgment in November, 1868; that C., in payment of a pre-existing debt, assigned to M., in July, 1868, one-half of his judgment against W., which is unpaid; that M. had full notice at the time of the demand of W. against C., which had been owned by W. since December 2, 1867; that C., during these times, was and is insolvent, and that the sheriff has executions upon the judgments in favor of M. against W. and W. against C. W. prays that his judgment may be set off against the judgment entered for C. M. demurred. *Held*, that the complaint states facts sufficient to constitute a cause of action. *Held* also, that W. has the right to set off his judgment against that assigned to M. *Held*, also, that M. is not a *bona fide* purchaser of the judgment against W., and holds the same subject to the right of set-off by W. *Wells v. Clarkson*, 230.
 19. *Demurrer — sufficiency of facts — relief.* An appellate court may consider the sufficiency of facts in a pleading, though the record shows no exception taken to the overruling of such demurrer. A demurrer is not good which goes to the relief only. *Morse v. Swan*, 306.

PLEADING — *Continued.*

20. *New matter — replication.* Whenever the answer in a cause pending sets up new matter, authorized and constituted by statute as a defense in such action, a replication is necessary, or such new matter will be held as admitted by plaintiff, and he will not be allowed to introduce testimony to contradict or disprove such admissions. *Davis v. Clark*, 310.
21. *Demurrer — complaint — several causes.* When the demurrer is to the whole of the complaint, containing several causes of action, and either one is sufficient, it fails. *Collier v. Ervin*, 335.
22. *Improper joinder — ground of demurrer specified.* Any demurrer to complaint, except for want of cause of action, and of jurisdiction, as if for improper joinder of action, should specifically point out the defect, or it will be disregarded. The mere language of the statute in such case is insufficient for the purpose. *Ib.*
23. *Bankrupt law.* An allegation that a mortgage is void under the bankrupt law is not sufficiently explicit without setting out the clause of the law under which the claim is made and the necessary facts to justify the introduction of evidence. *Smith v. Auerbach*, 348.
24. *Statute of frauds.* If a chattel mortgage is claimed to be void under the statute of frauds, the facts to authorize such proof must be specially pleaded. A mortgage is not void under this statute because given for a pre-existing debt, or for double the amount due; there must be the further allegation that it was done to hinder, delay, or defraud creditors. Taking possession of goods under a chattel mortgage is not wrongful, unless the instrument be shown to have been fraudulent, and the pleadings must contain the proper averments to allow such showing. *Ib.*
25. *Amendment of pleading.* A court, in furtherance of justice, and on proper terms, should allow an amendment of a pleading so as to make it correspond with the evidence introduced on trial, at any stage of the proceedings before final judgment, and may do so even after judgment. A refusal to do so may be cause of revising the judgment of the court below. Case of *Wormall v. Reins*, 1 Mon. 630, affirmed. *Hartley v. Preston*, 415.
26. *Repugnant facts not admitted by demurrer.* B. alleged in his complaint that G. is "utterly insolvent," and that the sheriff, if he is not enjoined by the court, will pay G. the amount of his judgment against B., over \$7,500. G. filed a demurrer. *Held*, that the demurrer admits the facts, which are pleaded correctly in the complaint, but does not admit the legal conclusions therein stated. *Held*, also, that the first allegation is repugnant to the last, and that the demurrer does not admit that G. is "utterly insolvent." *Boley v. Griswold*, 447.
27. *Sufficiency of pleading.* In a suit on an administrator's bond the averment that the probate court of the proper county had found assets in the hands of such administrator belonging to an estate, and had made an order for payment of a certain sum to a particular creditor of said estate coupled with a refusal of the administrator to pay such creditor according to order, is sufficient to show a breach of condition of the bond, and to maintain an action therefor. *Ryan v. Kinney*, 454.
28. *Complaint for trespass by cattle.* N. sued D. for damages caused by D.'s cattle, which broke and entered N.'s premises while they were roaming at large. The complaint alleged that the premises were inclosed by a good and substantial fence "eight and nine rails high," but did not allege that the fence was lawful. *Held*, that the complaint should not contain a legal conclusion, that the fence was lawful, and that the plaintiff could prove the kind and character of the fence. *Held*, also, that the allegation concerning the roaming of the cattle is immaterial. *Nichols v. Dobbins*, 541.
29. *Waiver of uncertainty in name.* The complaint did not state the

PLEADING — *Continued.*

- Christian name of N. D. answered and admitted that N. was in the possession of the premises when the alleged trespass was committed. *Held*, that D. waived his right to raise the question in this court that the complaint is uncertain in stating the name of N. *Ib.*
30. *Denial of ownership.* Under an answer denying "each and every allegation" in the complaint, which alleged that the plaintiff was the owner of certain personal property, the defendant may prove that he owned the same. *Staubach v. Rexford*, 565.
31. *Waiver of defect of parties by defendant.* A. brought this action against B. as the surviving partner of the firm of B. and C. The firm was composed of B., C. and D., but the answer of B. did not set forth that D. was a partner, or that there was a non-joinder of parties, and judgment was entered against B. alone. *Held*, that B. waived the defect of parties by failing to take advantage of it by demurrer or answer, and that the judgment was properly entered. *Parchen v. Peck*, 567.
32. *Ejectment — equitable defense.* In an action of ejectment, the defendant may set up an equitable defense, and a prayer in the answer for costs is appropriate relief. *Reece v. Roush*, 586.
33. *Christian names of parties in complaint.* The respondent, by the name of H. C. Wiebbold, commenced this action to foreclose a mortgage executed by the appellants. The appellants demurred to the complaint on the ground that the christian name of the respondent did not appear therein. The demurrer was overruled, and a judgment was entered for the respondent upon the failure of the appellants to answer. The forty-ninth section of the Civil Practice Act provides that the complaint shall contain "the name of the parties to the action, plaintiff and defendant." *Held*, that H. C. Wiebbold is not a legal name, and that the christian name of said Wiebbold must be stated in the complaint. *Held*, also, that the omission of the respondent to set forth in the complaint his christian name rendered the pleading defective for uncertainty, and the judgment entered thereon is void. *Wiebbold v. Hermann*, 609.

See PRACTICE, 49.

PLEDGE.

See ACTIONS, 4.

POKER.

- A game of chance — *within the statute — for the court and not for the jury to decide.* It is a question for the court and not for the jury to decide whether the game of cards usually denominated "poker" is a game of chance and within the statute, requiring the keepers of houses, where games of chance are played for money, to pay license therefor. The meaning of words and the grammatical construction of the English language, so far as established by rules and usages of language, are matters of law to be construed by the court. Only when words are used in a peculiar and unusual signification is testimony admissible for explanation. *Kennon v. King*, 437.

PRACTICE.

1. *Settlement of statement by successor of judge.* The Civil Practice Act, which provides that the judge or court shall settle the statement on appeal, authorizes the successor of the judge who tried the cause to settle the statement. *Edwards v. Tracy*, 22.
2. *Notice of amendment to statement.* A party who fails to file amendments to a statement on appeal, after he has been notified that the same has been

PRACTICE--*Continued.*

- filed, is not entitled to notice of the time when the same will be presented to the court for settlement. *Ib.*
3. *Statement settled in vacation.* The statement on appeal can be settled in vacation by the judge who tried the cause. *Ib.*
 4. *Time for taking appeals after judgment and rehearing.* G. commenced an action against R. in a justice's court, and an appeal was taken to the district court, where R. recovered judgment. G. made a motion for a rehearing, which was denied, and perfected this appeal within ninety days after the denial of the motion, but more than ninety days after the rendition of the judgment. The three hundred and sixty-ninth section of the Civil Practice Act provides that "an appeal may be taken * * * from a judgment rendered on an appeal from an inferior court, within ninety days after the rendition of the judgment." *Held*, that the motion for a rehearing is not a matter of right, and does not affect the judgment, which is final until reversed. *Held*, also, that this appeal must be dismissed, because the same was not perfected within ninety days after the rendition of the judgment. *Griswold v. Ryan*, 47.
 5. *Affirmance of judgment is void without legal appeal.* The affirmance of a judgment by this court is void for want of jurisdiction, if the plaintiff obtains the same by mistake or fraud, and perfects the appeal without the knowledge of the defendant, who had abandoned his appeal after filing the notice and undertaking therefor in the court below. *Harvey v. Whitlatch*, 55.
 6. *Judgment vacated on motion.* A void judgment can be set aside by this court upon a motion made at a term subsequent to that in which it has been entered. *Ib.*
 7. *Evidence withdrawn by court from jury.* A witness was asked if one of the persons indicted had made any confession to him, and, during the discussion of an objection to the question, answered that he had. The answer was withdrawn from the jury by the court. *Held*, that the rights of said person were not prejudiced by these proceedings. *United States v. Upham*, 170.
 8. *Assignment of errors — statement.* A statement on appeal that does not contain an assignment of errors must be disregarded. *Frohner v. Rodgers*, 179.
 9. *Motion for judgment.* The practice of filing a motion for judgment, after a verdict has been recorded by the clerk, is not required by the Civil Practice Act, and therefore unauthorized. *Ib.*
 10. *Informal verdict.* Courts can correct informalities in a verdict which do not affect the substance. *Ib.*
 11. *Verdict cures defective complaint — description of lode claim.* In this action in the nature of ejectment, the plaintiffs claimed two quartz lodes, alleged to be fifteen hundred feet in length and six hundred feet in width. The jury returned this verdict: "We, the jury, find for the plaintiffs, and allow and find for them only fifty feet on each side of said lodes. No damages allowed." *Held*, that the defective description of the premises specified in the complaint was cured by the verdict. *Held*, also, that the judgment must follow this general verdict. *Ib.*
 12. *Variance between pleadings and proof.* A variance between the pleadings and proof must be taken advantage of at the trial, and cannot be considered by this court upon an appeal to conform the judgment to the verdict. *Ib.*
 13. *Evidence must be certified.* This court will not examine the evidence in the transcript, if it is not certified to be correct by the judge who tried the cause, or agreed upon by the parties. *Smith v. Williams*, 195.
 14. *Examination of witnesses — leading question.* The following question is not leading: "State if, at any time during the summer of 1872, you had any transaction relative to the sale of a cabin to the plaintiff; if so, state what such transaction was?" *Ruff v. Rader*, 211

PRACTICE — *Continued.*

15. *Error cured by subsequent ruling.* The error of the court in excluding a question propounded to a witness is cured by allowing the witness to answer another question of the same character. *Ib.*
16. *New trial — grounds requiring affidavits.* A motion for a new trial for the causes of irregular proceedings, which prevented a new trial, and accident and surprise, will be refused if it is not made upon affidavits, as required by the 234th section of the Civil Practice Act. *Orr v. Haskell*, 225.
17. *Same — verdict against evidence.* A new trial will not be granted for the cause that the verdict is against the evidence, unless it appears clearly that the jury erred. *Ib.*
18. *Proof of mining rules — examination of, by jur.* A book containing the rules and regulations of the miners of the district, in which the mineral land in controversy in this action was located, was competent evidence under the 504th section of the Civil Practice Act, and the jury had the right, under the 207th section of the Civil Practice Act, to take said book to their room, upon retiring for deliberation. *Ib.*
19. *Objection to answer after verdict.* After the verdict has been returned, a party cannot complain for the first time that the denials in the answer are insufficient. *Ib.*
20. *Waiver.* The case of *Marden v. Wheelock*, 1 Mon. 49, holding that issues of law are waived after the trial upon the facts, affirmed. *Ib.*
21. *Appeal — variance — presumption.* In order that the appellate court may take notice of an alleged variance between the summons and the copy served, the record on appeal should set out such variance so that the court may determine its materiality, else it will be presumed to have been immaterial and will be disregarded. *Dunschen v. Higgins*, 302.
22. *Summons — service — copy of complaint — usage — inconsistency.* The service of summons with a true copy of the complaint, though such copy was not certified by the clerk as required by section 34 of the Civil Practice Act, is a sufficient compliance with section 36 of the same act, and gives the court jurisdiction to try and determine the case. Such service is according to general understanding and usage, and if the sections are inconsistent the subsequent should have greatest weight. *Ib.*
23. *Findings of fact — rulings of court — surprise — newly-discovered evidence.* To support exceptions to findings of fact or the rulings of court, the record should set out the evidence on which exceptions are based, and should show what rulings of the court were erroneous, and that they were properly excepted to at the time. Where surprise is claimed, it must be set forth and show sufficient legal cause. A new trial will not be granted on the score of evidence, cumulative in its nature, and that might have been produced at the first trial. *Morse v. Swan*, 306.
24. *Record.* If an attorney desires to obtain advantage of any motion decided in his favor, he should make it in writing, or see that it was made matter of record. *Ib.*
25. *Trial by court — presumptions.* When trial is by the court, the presumption is that every material fact in issue was found in favor of the party recovering judgment, unless the contrary appears of record. *Ib.*
26. *Construction — section 300, Civil Practice Act.* This section of the statute provides no new remedies or proceedings to redress the trespasses therein named. It only gives additional pecuniary relief. *Ib.*
27. *Appeal — subsequent order — statute construed.* On an appeal from an order made subsequent to the judgment, the court has power to reverse the judgment. A proper construction of section 378 of the Civil Practice Act gives the court such authority. *Collier v. Field*, 320.
28. *Exceptions — findings of court — if of fact must be specific.* A general exception to the findings of the court is insufficient. If to findings of fact, it should specifically point out wherein the finding was erroneous. *Collier v. Ervin*, 335.

PRACTICE—*Continued.*

29. *Decree—errors of law—several foreclosures sought—amount due on each—priority—sale of property.* Errors of law need not be set forth as specifically as those of fact. When the foreclosure of several mortgages is sought, and embraced in a single action, the decree should find the amount due on each, the priority or order in which each is to be paid, and only such property as is embraced in a particular mortgage should be sold to satisfy the debt secured thereby. *Ib.*
30. *Papers—considered on appeal.* This court will not review papers in the transcript, which were not used on the hearing in the court below, or have not been certified properly by the clerk of the district court. *Howard v. Quinn*, 339.
31. *Appeal from "judgments" and orders—review of evidence.* At the April term, 1875, A. recovered a judgment against K. for \$1, and K. recovered a judgment against A. for the costs. A.'s motion for a new trial was refused May 10, 1875. A. filed his notice of appeal July 5, 1875, and appealed from the "judgments" rendered in the action at said term. A. did not appeal from the order refusing the motion for a new trial. *Held*, that the appeal from the "judgments" does not embrace an appeal from the order refusing the new trial. *Held*, also, that this court cannot review any question of fact when there is no appeal from an order granting or refusing a new trial. *Allport v. Kelley*, 343.
32. *Denial—agreement of counsel.* An agreement in open court that a cause pending shall be tried on the general denial in the answer to every material allegation in the complaint, precludes a party from objecting to the sufficiency of such denial and the introduction of testimony thereunder. If such denial was deemed insufficient it was the duty of counsel to have demurred thereto. If the answer was defective it was cured by the agreement. *Ib.*
33. *Motion for rehearing.* It is not proper practice to present a case as though a rehearing had been granted on a motion for rehearing. *Wells v. Clarkson*, 379.
34. *Waiver of irregularities in appeal.* D. recovered a judgment in the probate court against P., who appealed. D. appeared generally at two terms of the district court and made two motions to dismiss the appeal for certain irregularities in the taking of the appeal. The motions were overruled, and D. proceeded voluntarily to a trial upon the merits of the action, and P. recovered judgment. *Held*, that D. waived the irregularities in the taking of said appeal. *Payne v. Davis*, 381.
35. *Common-law forms—scire facias—complaint.* The Civil Practice Act applies as well to cases in which the district court exercises the jurisdiction of the United States circuit and district courts, and in which the United States is a party. The common-law forms of procedure, including *scire facias*, are done away, and a complaint is necessary in all civil actions. *United States v. Ensign*, 396.
36. *Judgment reversed—new trial—special findings.* The entry of judgment in the appellate court as follows: "That the judgment rendered and entered in this cause in the court below be reversed and the cause remanded," does not necessitate that a new trial on the merits shall be had in the court below—the supreme court of the United States having in the meantime reversed their decision upon the main question on which the appeal was sustained, to wit: on the issue that a legal and equitable action could not be combined in one proceeding, and the special findings of the jury in the first trial being unquestioned, and warranting an entry of judgment by the court below without a new trial. *Woolman v. Garlinger*, 405.
37. *Jurisdiction of non-residents—publication of summons—proof of service.* H. commenced this action in Meagher county against C., a resident of the State of New York. On the application of H. the court made an order

PRACTICE—*Continued*

requiring the publication of the summons, and that copies of the complaint and summons be deposited in the post-office and directed to C. at his place of residence. The summons was published, but no affidavit was filed showing that said copies had been deposited in the post-office. *Held*, that the order of the court was legal under the forty-first section of the Civil Practice Act, and must be complied with before C. can be compelled to answer the complaint. *Held*, also, that affidavits showing that the order has been followed strictly are necessary to prove the service of the summons. *Held*, also, that the court did not acquire jurisdiction of C. *Haase v. Corbin*, 409.

38. *Attachment—answer and discharge of garnishees.* In this action a writ of attachment was served on certain persons, who answered that they had no goods or credits belonging to C. The answers were not contradicted, and no property of C. was found in the Territory. The action was dismissed on the ground that the court did not have jurisdiction of C. or the garnishees, and the garnishees were discharged. *Held*, that the answers of the garnishees must be considered true, and that the ruling of the court was correct. *Ib.*
39. *Source of title—defects cured—judgment supported by evidence.* The source of title need not be set forth in a complaint. Defective description or property is cured by answer. Where there is evidence to support the findings of a court, or the verdict of a jury, the appellate court will not reverse a judgment based thereon. *Ming v. Truett*, 1 Mon. 322, and *Griswold v. Boley*, *id.* 545, affirmed. *Vantilburgh v. Hamilton*, 413.
40. *Amendment of pleading.* A court, in furtherance of justice, and on proper terms, should allow an amendment of a pleading, so as to make it correspond with the evidence introduced on trial, at any stage of the proceedings before final judgment, and may do so even after judgment. A refusal to do so may be cause of revising the judgment of the court below. *Case of Wormall v. Reins*, 1 Mon. 630, affirmed. *Hartley v. Preston*, 415.
41. *Recognizance—suit on—in what name brought.* Suits on forfeited recognizances should be brought in the name of the Territory. The provision of statute that all actions should be in the name of real parties in interest does not apply. The Territory becomes trustee of money so recovered, and the law declares to whom it shall go. *Territory v. Hildebrand*, 426.
42. *Recognizance—jurisdiction—cause.* Under the statutes of Montana it is not necessary that a recognizance should show either the jurisdiction of magistrate or cause for its execution. *Ib.*
43. *Remedy for errors in appellate court—immaterial variations disregarded.* Errors in a former decision of the appellate court cannot be reviewed on an appeal from the judgment entered in the court below in pursuance of such decision, but only on motion for a rehearing or appeal to a higher court. The judgment of the court below in decreeing absolute title in the party in whose favor the appellate court directed that a perpetual injunction should issue, is not such error that this court will set aside such judgment. The finding in favor of the perpetual injunction presumes such title. *Barkley v. Tieleke*, 433.
44. *Findings by supreme court.* This court cannot find the facts from the evidence produced at the trial in the court below, and order that the judgment be entered thereon. *Id.* 435.
45. *Judgment upon the findings—new trial.* When the facts have been found by the court below and are not disturbed, and the conclusions of law are erroneous, this court will not order a new trial, but direct that the proper judgment be entered according to the facts. *Ib.*
46. *Nonsuit when complaint has several causes of action—judgment modified.* G. brought this action to recover from W. two distinct sums of money one for certain costs, and the other for the value of certain property W. admitted that he owed the costs. On the trial the court sustained

PRACTICE — *Continued.*

- W.'s motion for a nonsuit. *Held*, that the judgment of nonsuit should not be entered when the answer admits one cause of action in the complaint. *Held*, also, that the motion relating to the second cause of action was properly granted, and this court modified the judgment without granting a new trial, as it could administer justice to the parties. *Gans v. Woolfolk*, 458.
47. *Costs—effect of admission of one cause of action.* The four hundred and forty-second section of the Civil Practice Act authorizes a defendant to serve upon the plaintiff an offer to allow judgment to be taken against him for a certain sum, and the plaintiff cannot recover costs if he fails to obtain a more favorable judgment. W. admitted in his answer that he owed the amount stated in one cause of action in G.'s complaint, and G. did not "obtain a more favorable judgment." *Held*, that W. did not make the offer described in the statute, and G. recovered his costs. *Ib.*
 48. *Exceptions to instructions.* Where no exceptions were taken to the instructions of the court on the trial below, and properly saved at the proper time and in the proper way, they will not be regarded in the appellate court. *McKinney v. Powers*, 466.
 49. *Demurrer—answer over.* When a party amends his pleading on a judgment sustaining a demurrer thereto, he waives his right to call in question the action of the court in sustaining the demurrer. *Perkins v. Davis*, 474.
 50. *Instructions to jury.* It was not error for the court below to refuse to give the instruction requested by plaintiff in this case. It was much too general and required a verdict for services, that, as appears from pleadings, were to be paid from trust property, and for all that appears were so paid. *Ib.*
 51. *Settlement of statement on appeal.* It is the duty of the judge who tried the cause to settle the statement on appeal when the parties disagree. In doing so, he must rely upon his own recollection of what the testimony was, and not allow a new trial out of court to ascertain what transpired in court. *Hale v. Park Ditch Co.*, 498.
 52. *Rule No. 26—application.* Supreme Court Rule No. 26 does not apply to a case wherein the judge certifies according to his recollection of the testimony, but only in cases where the petition shows that he refused to certify as he remembers it. *Ib.*
 53. *Statement of evidence—exceptions.* This court will disregard a statement of the evidence on the motion for a new trial which has not been incorporated in a bill of exceptions. *Daniels v. Andes Insurance Co.*, 500.
 54. *Reversal of judgment—law of case.* The decision of this court in affirming the judgment of the court below on the first appeal of this action, *ante*, 78, became the law of the case in its subsequent stages. *Ib.*
 55. *Affidavits by United States commissioner.* The statutes of the Territory do not authorize a commissioner of the United States to take affidavits which can be admitted as evidence by the courts upon the trial of an action. *Ib.*
 56. *Taking of exceptions—waiver of statute.* The appellant did not save properly any exceptions to the instructions of the court, but during the trial the attorneys stipulated that "the said exceptions may be had, used and made available on appeal as is so regularly and properly taken." *Held*, that this practice is improper, and the authority of attorneys to make this agreement is doubted. *Ib.*
 57. *Jurisdiction.* Residence or service of summons is not necessary to confer jurisdiction over the person of defendant, where there is a voluntary appearance and answer. The district courts of the Territory are courts of general jurisdiction, and unless the contrary affirmatively appears, jurisdiction will be presumed, and appearance and answer waive all objections on the score of non-residence or non-service of summons. *Stephens v. Hartley*, 504

PRACTICE — *Continued.*

58. *Pledge — settlement — demand.* An action for money had and received will not lie by a pledgor against a pledgee, with power to sell until after settlement, and a demand of payment for balance found due. Where dispute arises as to the amount applicable for interest out of the avails of pledged securities, an action for accounting is the proper remedy. *Ib.*
59. *Application for temporary injunction — report of referee upon facts.* F. applied for an injunction, pending suit, to restrain C. from diverting water from a certain ditch. Under a rule of the district court, C. was ordered to show cause before a referee, who was appointed to take the testimony and report the facts. C. filed an answer, but did not offer any evidence, and moved to dissolve the temporary restraining order. The referee found that the testimony supported the material allegations of the complaint of F. No exceptions were taken to the findings, and the court dissolved the order. *Held*, that the motion of C. was irregular practice; that the facts reported by the referee had the effect of a special verdict; and that the court erred in ignoring the findings of the referee and dissolving the order. *Fubian v. Collins*, 510.
60. *Application for injunction.* Under the Civil Practice Act an application for a temporary injunction is a motion for an order. *Ib.*
61. *Form of exceptions — review of evidence.* I. made a motion for a new trial, on the ground that the evidence did not justify the findings and decision of the court. The motion was overruled, and the clerk noted the exception of I. to the ruling, but no bill of exceptions was prepared in "the usual form." *Held*, that the action of the clerk did not relieve I. from the duty of preparing a bill of exceptions "in the usual form," and that the evidence cannot be reviewed on this appeal. *First Nat. Bank of Helena v. Irvine*, 554.
62. *Time for filing statement on appeal.* The statement on this appeal was filed more than twenty days after the entry of the judgment, but within twenty days after the entry of the order overruling the motion for a new trial. I. appealed from the order and judgment. *Held*, that I. waived no rights by his failure to file the statement within twenty days after the entry of the judgment. *Ib.*
63. *Waiver of defect of parties by defendant.* A. brought this action against B. as the surviving partner of the firm of B. and C. The firm was composed of B., C. and D., but the answer of B. did not set forth that D. was a partner, or that there was a non-joinder of parties, and judgment was entered against B. alone. *Held*, that B. waived the defect of parties by failing to take advantage of it by demurrer or answer, and that the judgment was properly entered. *Parchen v. Peck*, 567.
64. *Instructions — evidence.* Courts should not state evidence to the jury in the form of an instruction, nor give an instruction when there is no evidence requiring it. Courts determine whether there is any evidence tending to establish a fact, and the jury determine whether the evidence does establish the fact. *Ib.*
65. *Error no injury.* A judgment will not be reversed when the instructions contain error, if no injury has been done. *Ib.*
66. *Waiver of motion to dismiss appeal.* The transcript on this appeal was filed at the January term, 1876, and the case was continued at the following August term by a written stipulation, in which counsel continued all cases in which they were interested. The respondent, at the January term, 1877, moved to dismiss the appeal because the notice of appeal was served four days before it was filed. *Held*, that the respondent, by his delay, waived the right to make the motion. *Toonsley v. Hornbuckle*, 580.
67. *Judgment — effect of ruling requiring replication — separate trial.* T. brought this action against four persons to obtain an injunction and recover damages for the diversion of water. H. answered separately and set up title to the water, and the other parties filed a general denial. The

PRACTICE—*Continued.*

- court overruled T.'s motion to strike out parts of H.'s answer, and ordered T. to reply thereto, and allowed H. a separate trial. T. refused to offer any evidence when the cause was called for trial, and judgment was entered for H. for his costs. *Held*, that the ruling upon the motion and replication did not injure T., and that the court properly exercised its discretion in granting H. a separate trial. *Ib.*
68. *Argument of counsel.* On the hearing of this appeal the counsel for the auditor, the appellant, submitted a written argument and contended that the auditor had jurisdiction to determine the value of F.'s services. *Held*, that the court will not permit the auditor to controvert his answer, and that the question cannot be raised on this appeal. *Fisk v. Cuthbert*, 593.
69. *Presumption about papers used on hearing of motion.* E. gave notice of a motion to modify a judgment by striking therefrom the part taxing against him the costs of a receiver. The motion said it was based upon the papers in a number of cases which were specified. The motion was overruled and E. appealed, but no papers appear in the transcript except those belonging to this action. *Held*, that this court must presume that the papers in the transcript were not used on the hearing of the motion. *Ervin v. Collier*, 605.
70. *Taxation of costs of receiver.* E. brought this action to restrain C. from working mining property and obtaining the possession of the same, and recovered a judgment. After a hearing, a receiver was appointed under a written stipulation of the parties, to take charge of the property during the litigation. The costs of the receiver were taxed against the proceeds of the property and E. then made said motion. *Held*, that no facts controlling the sound discretion of the court appear in the record, and that the costs of the receiver should have been taxed against C. *Ib.*
- Attachment by creditors of judgment in favor of debtor.* See ATTACHMENT.
- In district courts.* See DISTRICT COURTS.
- On appeal.* See APPEAL.

PRINCIPAL AND AGENT.

When declarations of agent bind principal. See EVIDENCE, 11.

PROBATE COURT.

Jurisdiction—remedy—collateral proceedings. The jurisdiction of probate courts over the distribution of the estates of deceased persons is exclusive, and all orders and decrees relating thereto are final and binding upon all parties to the same. The only remedy is by appeal as provided by statute. Such orders and judgments cannot be impeached in any collateral proceedings except for fraud. *Ryan v. Kinney*, 454.

PROBATE JUDGE.

1. *Attorney.* The probate judge cannot act as attorney in his own court. *Smith v. Lovell*, 332.
2. *Seal.* The probate judge, acting as a committing magistrate, is not performing the functions of a probate court, and need not use the court seal. *Territory v. Hildebrand*, 426.

See OFFICIAL BOND.

PUBLICATION.

Service by. See PRACTICE, 37.

QUO WARRANTO

Redress of public wrongs. The first section of the Civil Practice Act, approved December 23, 1867, which provides that there shall be "but one form of civil action for the enforcement or protection of private rights, and the redress or prevention of private wrongs," does not apply to information, in the nature of *quo warranto*, which are solely employed to enforce or protect public rights, and redress or prevent public wrongs. *Territory v. Virginia Road Co.*, 96.

RECEIVER.

See COSTS.

RECOGNIZANCE.

1. *Suit on — in what name brought.* Suits on forfeited recognizances should be brought in the name of the Territory. The provision of statute, that all actions should be in the name of real parties in interest, does not apply. The Territory becomes trustee of money so recovered and the law declares to whom it shall go. *Territory v. Hildebrand*, 426.
2. *Jurisdiction — cause.* Under the statutes of Montana it is not necessary that a recognizance should show either the jurisdiction of magistrate or cause for its execution. *Ib.*
3. *Construction — ambiguity.* The recital in the recognizance was that the defendant should appear to answer on the first day of the next October term, but added erroneously, "it being the second Monday in October, 1874," whereas the term was fixed by law to open on the first Monday in the month. *Held*, that the recital was sufficient; the erroneous portion should be rejected as surplusage; the law fixes the day of the term. *Ib.*
4. *Variance — no consideration.* An attempt to commit murder, and an assault with intent to commit murder, are different offenses under our statutes. If the order of the magistrate required defendants to appear and answer a certain crime, a recognizance conditioned to answer any other offense is bad. There is no consideration for such a contract. *Ib.*

REFORMATION OF AGREEMENT.

See MISTAKE OF LAW.

REHEARING.

Motion for. See APPEAL.

REPEAL.

Prosecution after repeal of statute. A party cannot be convicted of an offense after the statute defining it has been repealed, and there is no legislation saving pending prosecutions. *Territory v. Ashby*, 89.

See NUISANCE.

REPLICATION

When necessary — new matter. Whenever the answer in a cause pending sets up new matter, authorized and constituted by statute as a defense in such action, a replication is necessary, or such new matter will be held as admitted by plaintiff, and he will not be allowed to introduce testimony to contradict or disprove such admissions. *Davis v. Clark*, 310.

REPLEVIN.

See CLAIM AND DELIVERY.

REVENUE ACT.

See TAXES.

ROAD.

Usurpation of — failure to repair. See FRANCHISE.

SALE.

1. *By execution — fraud of creditor.* The sale of real property under an execution, which has been issued in excess of the judgment through the fraud of the creditor, and which the debtor has not sought to correct by an amendment, does not affect the rights of *bona fide* purchasers. *Roush v. Fort*, 482.
2. *Mistake of creditor.* The judgment creditor acquires the title to the property of the debtor under a sale, by virtue of an execution, that has been issued through his mistake in excess of the judgment. *Ib.*
3. *Purchase by fraudulent trustee.* A trustee, who receives the rents of the property which has been delivered to him by his debtor, and does not apply the same upon the judgments according to his agreement, and causes the property to be sold under an execution in excess of the judgment, after allowing the proper credits, and becomes the purchaser, is faithless in the performance of his trust, and the sale will be set aside upon the motion of the debtor. *Ib.*

SEAL.

Probate seal. The probate judge, acting as a committing magistrate, is not performing the functions of a probate court, and need not use the court seal. *Territory v. Hildebrand*, 426.

SET-OFF.

1. *Pleading — complaint in action to set off judgments — liability of assignee with notice.* The complaint in this case alleges that C. obtained judgment against W. in July, 1868, for \$5,000 for personal injuries; that W. obtained judgment upon a promissory note against C. in October, 1868, for \$2,673, which is unpaid; that W. paid C. one half of his judgment in November, 1868; that C., in payment of a pre-existing debt, assigned to M., in July, 1868, one-half of his judgment against W., which is unpaid; that M. had full notice at the time of the demand of W. against C., which had been owned by W. since December 2, 1867; that C., during these times, was and is insolvent, and that the sheriff has executions upon the judgments in favor of M. against W. and W. against C. W. prays that his judgment may be set off against the judgment entered for C. M. demurred. *Held*, that the complaint states facts sufficient to constitute a cause of action. *Held*, also, that W. has the right to set off his judgment against that assigned to M. *Held*, also, that M. is not a *bona fide* purchaser of the judgment against W., and holds the same subject to the right of set-off by W. *Wells v. Clarkson*, 379.
2. *Unliquidated damages — assignment.* Though a claim for unliquidated damages is not a proper set-off against a claim founded on contract, a judgment in favor of one party is a proper offset against a judgment for damages subsequently obtained by the judgment debtor, and any assignment of such judgment or portion thereof to a third party, after this equitable right has attached, will not be allowed to defeat the same. *Ib.*

SERVICE OF SUMMONS ON NON-RESIDENT.

See PRACTICE, 37.

STATUTORY CONSTRUCTION.

1. *Legislative intent.* Courts ascertain the intention of legislatures in enacting a statute, by considering the object sought and effect of their interpretation, and are not restricted to the words which are used. *Perkins v. Guy* 15.
2. "All debts due"—*judgment*—*note.* The one hundred and forty-first section of the Civil Practice Act, which provides that "all debts due such defendant" may be attached, does not include judgments and promissory notes not due. *Ib.*
3. *Repeal by implication.* The act of the legislative assembly, approved January 10, 1865, which fixed the fees to be paid to district attorneys, was repealed by implication by the act, approved February 9, 1865, which established different fees for the same services. *Williams v. Jefferson County*, 26.
4. *Fee of district attorney.* The act, approved February 9, 1865, allowed the district attorney a fee "for drawing each indictment * * * provided that no fee shall be allowed for drawing any indictment that may be quashed." *Held*, that district attorneys are not entitled to fees for drawing indictments, which have been quashed for any cause. *Held*, also, that district attorneys are entitled to the fee for drawing an indictment, which has been returned by the grand jury and duly indorsed, "not a true bill." *Ib.*
5. *Docket fee of district attorney.* The act, approved February 9, 1865, allowed the district attorney fees for "convictions of misdemeanors," "convictions for felony," "convictions in capital cases," and docket fees in all cases not above specified, where county attorney is required to prosecute or defend in district courts." *Held*, that district attorneys are not entitled to docket fees in criminal cases. *Ib.*
6. *Demand by officer for redelivery of attached property.* The amendment to the one hundred and thirty-seventh section of the Civil Practice Act approved January 15, 1869, prescribes the following conditions of an undertaking for the release of attached property by the officer, which "the sheriff shall require:" "That, in case the plaintiff recover judgment in the action, defendant will, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment." *Held*, that the officer, to whom the undertaking is given, is the proper person to make the demand for the redelivery of the property. *Driggs v. Harrington*, 30.
7. *Denials in answer.* The fifty-sixth section of the Civil Practice Act, approved January 12, 1872, provides that "the answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." *Held*, that this section does not embrace denials made upon information and belief. *Sands v. Marlay*, 35. (See *Cases Overruled*, ante.)
8. *Affidavit of verification—denials.* The sixty-third section of the said act, which requires that "the affidavit of verification shall state, that the facts stated * * * are true * * * except as to those matters which are therein stated on" the "information and belief" of the affiant, does not modify said fifty-sixth section and authorize parties to make denials upon information and belief. *Ib.*
9. *Hardship.* Courts will not consider the hardship which may result from their interpretation of a statute. *Ib.*
10. *Rules of statutory construction.* Courts construe statutes and ascertain the intention of the legislative assembly by considering every part of the act, its subject matter, object and intent. *Daniels v. Andes Ins. Co.*, 78.
11. *Act securing mechanics' liens constitutional.* The act of the legislative assembly, approved January 12, 1872, (Cod. Sts., chapter 40), secures liens to mechanics for their labor, and confers upon the district court chancery jurisdiction to determine the rights and priorities of the liens of mechanics

STATUTORY CONSTRUCTION — *Continued.*

- and mortgagees. The 6th section of the Organic Act of the Territory provides "that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the constitution of the United States, and the provisions of this act." *Held*, that said act of the legislative assembly is constitutional. *Held*, also, that said act secures a lien to a mechanic for work which has not been performed under any contract. *Alvord v. Hendrie*, 115.
12. *Void act.* Courts will not declare a statute void, unless there has been a manifest assumption of authority by the law-making power. *Territory of Montana v. Lee*, 124.
 13. *Rules of statutory construction.* Courts apply the rules and principles of interpretation to the statutes, which are ambiguous, doubtful and uncertain. *Smith v. Williams*, 195.
 14. *Plain statutes need no interpreter.* Statutes which are expressed in plain and definite language require no judicial construction, and must be enforced according to the intention of the law-making power. *Ib.*
 15. *Act to prevent the trespassing of animals upon private property expounded.* S. brings this action against W. to recover damages for the destruction of his growing grain by the cattle of W., which broke and entered his farm. The statute (Cod. Sts., 373, § 1), provides that if any cattle "shall break into any ground inclosed by a lawful fence," the owner of the animal "shall be liable to the owner of such inclosed premises for all damages sustained by such trespass." *Held*, that there must be a substantial compliance with the statute; that an immaterial variation in the height of the fence from that of a lawful fence would not defeat the action, and that a lawful fence, or an obstruction of the same character, must surround entirely the ground or premises, as a condition precedent to the right to bring an action for damages. *Ib.*
 16. *Costs.* The 417th and 551st sections of the Civil Practice Act regulate costs on appeal, and must be construed together. *Hibbard v. Tomlinson*, 220.
 17. *Section 300, Civil Practice Act.* This section of the statute provides no new remedies or proceedings to redress the trespasses therein named. It only gives additional pecuniary relief. *Morse v. Swan*, 306.
 18. *Appeal.* Statutes should be construed liberally to maintain the right of appeal. *Payne v. Davis*, 381.
 19. *Mining lode — width of lead — point of measurement.* The proper construction of the act of the Montana legislature, December 26, 1864, contained in the Codified Statutes, 522, § 3, is that the measurement of the fifty feet on either side of the lead, allowed for working purposes, should begin from the outer walls of the lead, on each side, and not from the center of the lead itself. *Boote v. National Mining Co.*, 402.
 20. *Act relating to mining claims — record of discovery.* At the trial of this action to determine the right to the possession of certain placer mining ground, M. offered evidence to prove that he made and filed, in the office of the county recorder, a statement of his discovery of the ground. The statute approved May 8, 1873, provides that this statement shall be made and filed when "any mining claim upon any vein or lode bearing * * * valuable deposits" is discovered. *Held*, that a vein or lode bearing valuable deposits does not include a placer mining claim, and that the discoverer of placer mining ground is not required, by the laws of the Territory, to make or file for record a statement of its discovery. *Held*, also, that the evidence is inadmissible. *Moxon v. Wilkinson*, 421.
 21. *New trial — statement of errors.* The amendments of the Civil Practice Act, approved February 13, 1874, require the party intending to move for a new trial to give "the points in writing, particularly specifying the grounds of such motion." *Held*, that the decisions of this court, holding that this party must specify the particulars in which the evidence is insuf

STATUTORY CONSTRUCTION — *Continued.*

- ficient to justify the findings or judgment, and point out wherein the same are against law, have not been affected by these amendments. *Held*, also, that these amendments repealed the sections of the Civil Practice Act which required the preparation and settlement of a statement before the motion for a new trial could be heard. *Taylor v. Holter*, 476.
22. *Form and review of exceptions.* Said amendments will not allow this court to consider exceptions which have not been reduced to form and signed during the term, or noted by the clerk, unless counsel consent, or the judge orders that they be prepared in vacation. *Ib.*
23. *Appointment of referee — injunction.* The two hundred and twenty-third, two hundred and twenty-fourth, two hundred and twenty-seventh and five hundred and eighty-first sections of the Civil Practice Act confer upon the district courts the power to appoint a referee to take the testimony and report the facts, upon the application of a party for a temporary injunction. *Fabian v. Collins*, 510.
24. *Jurisdiction of offense of assault and battery.* The legislative assembly conferred upon the district court "jurisdiction of all offenses not cognizable in the probate or justice of the peace courts." F. was indicted at a term of the district court, for the statutory crime of assault and battery, which was within the jurisdiction of the probate court. A demurrer to the indictment on the ground that the court had no jurisdiction was sustained. *Held*, that the district court, notwithstanding this statute had jurisdiction of the crime under the ninth section of the Organic Act of the Territory, which confers upon it "common-law jurisdiction." *Territory v. Flowers*, 531.
25. "Common-law jurisdiction" defined. Said clause, "common-law jurisdiction," refers to the right to hear and determine every case at law, excepting suits in equity and admiralty, and matters in courts-martial, and embraces criminal actions which are cases at law. *Ib.*
26. *Concurrent jurisdiction of crimes.* The second section of the amendment to the Organic Act, approved March 2, 1867, which confers upon the probate court jurisdiction of certain "criminal cases," does not deprive the district court of its jurisdiction of the same. The jurisdictions in these cases are concurrent. *Ib.*
27. *Rule for determining jurisdiction of courts.* The jurisdiction of the courts created by the Organic Act is determined by referring to said act, the statutes of the Territory, and the general history of jurisprudence throughout the United States. *Ib.*
28. *Revenue act — taxation of calves.* The third section of the Revenue Act, approved January 12, 1872, does not exempt calves from taxation in the Territory, and the fourth section mentions "cows and calves" as property subject to taxation. The fifteenth section says that the tax list shall include "cows and calves." The sixteenth section contains a list of questions, which must be answered under oath by the tax payer, and specifies "heifers and steers between one and two years old," but does not mention calves. The last question requires the party to "enumerate" "any other property than that above mentioned." *Held*, that calves are not included by the question about the "heifers and steers," and that the list of questions is a form. *Held*, also, that calves are taxable under the Revenue Act, and are embraced by the question as "other property." *Milligan v. Jefferson County*, 543.
29. *Interest upon county warrants.* The act approved January 11, 1872, provided that county warrants should not bear interest after its passage. The act approved January 12, 1872, provided that said warrants should bear interest at the rate of ten per cent per annum after they had been presented to the county treasurer and duly indorsed not paid. *Held*, that the first act was repealed by the last, and that the warrants bear interest at said rate. *Higgins v. Edwards*, 585.

STATUTORY CONSTRUCTION — *Continued.*

90. *Printing "at the public expense" brands and marks.* The act relating to brands and marks (Cod. Sts., ch. 64), provides that the general recorder shall have published a list of certain marks and brands, and cause to be printed, "at the public expense," a sufficient number of copies to furnish each county clerk in the Territory with copies for gratuitous distribution. *Held*, that this statute authorizes the general recorder to enter into a contract for the printing of said list at the expense of the Territory. *Risk v. Cuthbert*, 593.
31. *Duty of auditor.* In determining the duty of the Territorial auditor in doubtful cases, courts will consider the financial legislation of the Territory and the practical construction of the same by the public officers. *Ib.*
- Criminal laws, § 185 — nuisance.* See NUISANCE.

See CONSTITUTIONAL LAW; LIMITATIONS.

STATUTE OF FRAUDS.

1. *Pleadings.* If a chattel mortgage is claimed to be void under the statute of frauds, the facts to authorize such proof must be specially pleaded. A mortgage is not void under this statute because given for a pre-existing debt, or for double the amount due; there must be the further allegation that it was done to hinder, delay, or defraud creditors. Taking possession of goods under a chattel mortgage is not wrongful, unless the instrument be shown to have been fraudulent, and the pleadings must contain the proper averments to allow such showing. *Smith v. Auerbach*, 348.
2. *Oral agreement relating to sale of real property — resulting trust.* A. owned and possessed real property, which was sold by the sheriff under a judicial decree. Before the sale, A. and B. entered into an oral agreement, under which B. bid off the property and advanced the purchase-money and held the legal title for A. A. secured the payment of the money by certain rents, which have paid the sum advanced by B. A. continued in the peaceable possession of the property about five years, when B. brought this action to recover the possession. *Held*, that the agreement is not within the statute of frauds, and that B. is the trustee of A. *Held*, also, that the trust is created "by act or operation of law." *Held*, also, that a delivery of the property to A. by B., after the sheriff's sale, can be inferred from the facts and acts of the parties. *Reece v. Roush*, 586.

STATUTE OF LIMITATIONS.

See LIMITATIONS.

SUMMONS.

Service — copy of complaint — usage — inconsistency. The service of summons with a true copy of the complaint, though such copy was not certified by the clerk as required by section 34 of the Civil Practice Act, is a sufficient compliance with section 36 of the same act, and gives the court jurisdiction to try and determine the case. Such service is according to general understanding and usage, and if the sections are inconsistent, the subsequent should have greatest weight. *Dunschen v. Higgins*, 302.

Service of, by publication. See PRACTICE, 37.

SUPREME COURT.

Appellate jurisdiction. The Civil Practice Act has superseded the rules of the high court of chancery in England, and does not allow an appeal from "every actual determination" of the court below. *Plaisted v. Nowlan*, 359.

SURETY.

1. *Liability of — official bond — probate judge — breach of conditions.* The failure of the probate judge to make the proper order on the final report of the administrator, and instead thereof, ordering said administrator to pay over the moneys belonging to the estate into the hands of the probate judge, is such a breach of the condition of the official bond, guaranteeing "a faithful performance of official duties," as to sustain an action by the lawful heirs against the sureties of the probate judge. Failure to do what the law requires, as well as doing what the law does not allow, is a breach of the bond. *Smith v. Lovell*, 332.
2. *Liability of sureties upon a bond not signed by the principal — estoppel.* N. obtained a judgment in the probate court against K. K. appealed and gave a bond, in the body of which his name appeared as the principal and the appellants as the sureties, with the usual condition of a statutory undertaking on appeal. N. recovered judgment against K. in the district court and then commenced this action against the sureties on the bond. At the trial the sureties offered evidence showing that the bond was delivered to the probate judge with directions not to file the same until K. signed it; that the judge promised so to do, but filed the bond without K.'s signature; and that the sureties did not know it was filed until the appeal had been determined. The evidence was excluded by the court. *Held*, that the bond is not a statutory undertaking on appeal, and that the sureties are not liable thereon. *Held*, also, that N. had notice of the insufficiency of the bond on its face when it was filed, and that the evidence should have been admitted. *Held*, also, that the sureties are not estopped from denying the validity of the bond. *Ney v. Orr*, 559.

See UNDERTAKING.

TAXES.

Revenue Act — taxation of calves. The third section of the Revenue Act, approved January 12, 1872, does not exempt calves from taxation in the Territory, and the fourth section mentions "cows and calves" as property subject to taxation. The fifteenth section says that the tax list shall include "cows and calves." The sixteenth section contains a list of questions, which must be answered under oath by the tax payer, and specifies "heifers and steers between one and two years old," but does not mention calves. The last question requires the party to "enumerate" "any other property than that above mentioned." *Held*, that calves are not included by the question about the "heifers and steers," and that the list of questions is a form. *Held*, also, that calves are taxable under the Revenue Act, and are embraced by the question as "other property." *Milligan v. Jefferson County*, 543.

TENDER.

Of bulky goods — waiver of tender — place of delivery. G. attached 600 yards of carpet, fastened to the floor of A.'s hotel, as the property of A. B. sued the officer to recover the carpet, and gave him an undertaking executed by W. for its return and the payment of any damages, "if return thereof be adjudged." The property was then delivered to B. The officer recovered judgment against B., and W. immediately served on G. and the officer written notices that the carpet would be delivered to them at the hotel, and requested them to go there and receive it. G. and the officer refused to receive the property. *Held*, that the carpet is a bulky article which could be delivered at a convenient place designated by the parties entitled to it. *Held*, also, that W. and the other persons, who were required to tender the carpet, could select a suitable place for its delivery upon the failure of G. or the officer to designate the same, and the refusal

TENDER — *Continued.*

of G. and the officer to receive the property at the place so selected was adjudged in this action a legal return thereof. *Held*, also, that the allegation of the tender of the carpet to G. by W. is established by testimony showing that G. refused to receive it under the foregoing facts. *Gans v. Woolfolk*, 458.

TOWN SITE.

1. *Trustee of — power — deed.* The trustee of a town site upon the public lands, under the laws of the United States and this Territory, has no right to make a deed of a vacant lot to a citizen who is not in the possession of, or without the right of possession to, the premises. *Edwards v. Tracy*, 49.
2. — *Not a court.* Such a trustee has no judicial power, and cannot execute a deed of a town lot to an applicant who has not complied strictly with the law. *Ib.*
3. *Sale of unclaimed lots.* The deed to an unclaimed lot in a town site is void if the trustee has executed the same without advertising that it would be sold at public sale. *Ib.*
4. *Evidence — record of case adjudged inadmissible.* In the trial of an action brought by E. to set aside a deed delivered to T., the court erred in admitting as evidence the record of a case between T. and the trustee of a town site, in which T. failed to procure a writ of mandate requiring said trustee to make said deed. *Ib.*
5. *Case affirmed.* The case of *Ming v. Truett*, 1 Mon. 322, holding that the statutes do not confer judicial powers upon the trustee of a town site in awarding deeds, affirmed. *Ib.*
6. *Trustee of — authority — estoppel — dedication of alley.* The town site of Helena was surveyed, and the plat was accepted and filed by the proper officers January 7, 1869. H. claimed that certain land is a public alley, which is so described in the deed to him by the trustee of the town site, but is not so designated upon the plat. A. applied for and received a deed to the land from the trustee. The trustee and other officers derived their authority from the laws of the United States and Territory relating to the reservation and sale of town sites. *Held*, that the trustee has no judicial power, and cannot dedicate any part of the town site as an alley. *Held*, also, that the trustee is not estopped from executing a deed to the claimant of a lot which has been described improperly as an alley by his predecessor in the office. *Held*, also, that parties who receive deeds from the trustee are required to ascertain his authority, and acquire no right to the use of a part of the town site which has been described illegally as an alley. *Hall v. Ashby*, 489.

TRIAL.

1. *Jurors forming opinions guilty of contempt.* Persons who have been summoned to attend court as jurors commit a contempt of court by talking with litigants and forming an opinion upon the merits of their cases. *Ruff v. Rader*, 211.
2. *Facts requiring a juror incompetent.* A juror testifies, when examined respecting his qualifications to serve, that he has formed an opinion concerning the merits of a case by talking with one of the parties and believing what he said regarding it; that he cannot say that it is an unqualified opinion; that sufficient evidence would change his opinion; that he thinks he can render an impartial verdict, and that his opinion is dependent upon the truth of what he had heard. *Held*, that said juror is not competent to sit in the trial of the case. *Ib.*
3. *An "unqualified opinion" by jurors.* A juror who hears and accepts as true the statement of a case by a party or witness, forms an "unqualified

TRIAL—*Continued.*

- opinion" within the meaning of the 198th section of the Civil Practice Act. *Ib.*
4. *Examination of witnesses—leading question.* The following question is not leading: "State if, at any time during the summer of 1872, you had any transaction relative to the sale of a cabin to the plaintiff; if so, state what such transaction was?" *Ib.*
 5. *Practice—error cured by subsequent ruling.* The error of the court in excluding a question propounded to a witness is cured by allowing the witness to answer another question of the same character. *Ib.*
 6. *Trial by court—presumptions.* When trial is by the court, the presumption is, that every material fact in issue was found in favor of the party recovering judgment, unless the contrary appears of record. *Morse v. Swan*, 306.

TRUST.

Oral agreement relating to sale of real property—resulting trust. A. owned and possessed real property, which was sold by the sheriff under a judicial decree. Before the sale, A. and B. entered into an oral agreement, under which B. bid off the property and advanced the purchase-money, and held the legal title for A. A. secured the payment of the money by certain rents, which have paid the sum advanced by B. A. continued in the peaceable possession of the property about five years, when B. brought this action to recover the possession. *Held*, that the agreement is not within the statute of frauds, and that B. is the trustee of A. *Held*, also, that the trust is created "by act or operation of law." *Held*, also, that a delivery of the property to A. by B., after the sheriff's sale, can be inferred from the facts and acts of the parties. *Reece v. Roush*, 586.

TRUSTEE.

Of town site. See **TOWN SITE.**

UNDERTAKING.

1. *On attachment—liability of sureties—useless demand.* The sureties upon an undertaking which has been executed to the sheriff in pursuance of the amendment to the 137th section of the Civil Practice Act, approved January 15, 1869, are not released from their liability by the failure of the officer or any party to make a demand upon the defendants in the attachment suit for the redelivery of the property, if the acts of said defendants have rendered useless such a demand. *Briggs v. Harrington*, 30.
2. *Case stated when demand is excused.* In an action brought against the sureties upon a statutory undertaking for the redelivery of attached property, no demand is required for the redelivery of the property which has been released, when the property has been removed from the Territory by the defendant in the attachment suit, and said defendant is insolvent and has left the Territory, and has no place of residence or business therein, and the sureties have been notified that the judgment which was obtained in the attachment suit remains unpaid. *Ib.*
3. *On appeal—action on—docketing, a ministerial act—its purpose.* The ruling in the case of *Craigton v. Hershfield*, 1 Mon. 639, to the effect that a deficiency judgment should be provided for in the decree, and afterward entered and docketed, in order to sustain an action on an undertaking to pay any deficiency on sale of mortgaged premises, given on appeal, is overruled. That decision was based on the case of *Orchard v. Hughes*, 1 Wall. 77, and on rule 96 of the United States supreme court, of which the former was reversed and the latter became inoperative. The law requires a deficiency on the sale of mortgaged premises to be docketed to become a lien and notify third parties. A decree need not contain what the law

UNDERTAKING — *Continued.*

- requires to be done without it, and the act of the clerk in such cases is in no sense a judgment, nor is it final or decisive. *Creighton v. Hershfield*, 386.
4. *A civil action.* The action on a forfeited undertaking, though given to secure appearance in a criminal case, is itself a civil action on a contract with liquidated damages. *United States v. Ensign*, 396.
 5. *On appeal.* The undertaking on appeal must comply substantially with the statute. *Stapleton v. Pease*, 508.
 6. *Excess in penalty.* An undertaking on appeal which is executed in the penal sum of \$500, when the statute fixes the same at \$300, is valid. *Ib.*
- See BOND.

UNITED STATES.

1. *Appeals in United States courts.* The appellate jurisdiction of the courts of the United States is regulated by the acts of congress. (See *Cases Overruled.*) *United States v. McElroy*, 237.
2. *Laws of Territory.* The Civil Practice Act, which prescribes the mode of appealing to this court, is not applicable to cases arising under the constitution and laws of the United States. *Ib.*
3. *Case overruled.* The case of *The United States v. McElroy*, ante, 237, deciding that an appeal from the district court, in a case arising under the laws of the United States and perfected according to the requirements of the Civil Practice Act, was irregular and unauthorized, is hereby overruled. *Ib.*, 494.
4. *Construction of Organic Act — ninth section — appeals — in all cases — "same as in other cases" — different jurisdictions.* The ninth section of the Organic Act of the Territory allows appeals in all cases from the final decision of the district court to the supreme court, under such regulations as may be prescribed by law. Appeals being allowed in cases wherein the district court exercises the jurisdiction of the United States district and circuit courts, "the same as in other cases," this must, of necessity, refer to Territorial cases, and hence the Civil Practice Act applies to every class of cases that may arise under any jurisdiction the court can exercise. *Ib.*

UNITED STATES COMMISSIONER.

Affidavits by. The statutes of the Territory do not authorize a commissioner of the United States to take affidavits which can be admitted as evidence by the courts upon the trial of an action. *Daniels v. Andes Ins. Co.*, 500

USURPATION.

1. *Of franchise — statutory remedy for usurpation — private remedy.* The eighth section of said act of incorporation gives persons the right to make complaints of the bad condition of the defendant's road, before a justice of the peace, and prescribes fines and other penalties against defendant for a failure to keep its road in good repair. *Held*, that this remedy does not modify the common-law and statutory remedy for the usurpation of a franchise by defendant. *Held*, also, that defendant subjects its franchise to forfeiture, upon its failure to keep its road in good condition. *Territory v. Virginia Road Co.*, 96.
2. *Grants of franchises.* Grants by the legislative assembly, which confer franchises, are contracts between the sovereign power of the Territory and private citizens, upon certain conditions precedent, which must be complied with. *Ib.*

VARIANCE.

Variance between pleadings and proof. A variance between the pleadings and proof must be taken advantage of at the trial, and cannot be considered by this court upon an appeal to conform the judgment to the verdict. *Frohner v. Rodgers*, 179.

VERDICT.

1. *In criminal case.* A verdict of guilty in a criminal action will be sustained if there is substantial proof to support it. *United States v. Upham*, 170.
2. *Assault with intent to commit murder—form of verdict.* The statute does not divide into degrees the crime of an assault with intent to commit murder, and the following verdict, under an indictment charging this offense, is sufficient: "We, the jury, find the defendant guilty as charged in the indictment." *Territory v. Perkins*, 467.

On indictment for murder must find degree. See MURDER.

See JURY; PRACTICE, 29, 31.

WAIVER.

See PLEADING; PRACTICE, 20.

WATER RIGHT.

1. *Remedy of claimants.* Equity affords the appropriate remedy in an action in which both parties claim the prior right to the use of water for mining purposes. *Barkley v. Tieleke*, 59.
2. *Conveyance of water right—possession.* Under the laws of this Territory, the transfer of a ditch and water right requires the same form and solemnity as a conveyance of real estate; but an interest in such property can be acquired by appropriation. *Ib.*
3. *Imperfect conveyance of water right—abandonment.* The attempt to convey a water right by an imperfect deed operates as an abandonment of the title obtained by the appropriation thereof. *Ib.*
4. *Recapture of water—estoppel.* The prior appropriator is estopped from asserting a claim to water after it has been abandoned by him and recaptured by another. *Ib.*
5. *Action by possessor of water right.* A party who is in the possession of a ditch, and the water incident thereto, has an equitable interest therein, and can maintain an action against trespassers. *Ib.*

WITNESS.

1. *Criminal law—right of accused to be confronted with witnesses.* A party, who has been indicted for the commission of a misdemeanor, waives his constitutional right "to be confronted with the witnesses against him," by admitting that witnesses, if present, would testify to certain facts stated in the affidavit of the district attorney for a continuance, and thereby preventing a postponement of the trial. *United States v. Sacramento*, 239.
2. *Impeaching witness—cross-examination—extent of information—jury not judge to decide.* An impeaching witness may be cross-examined as any other to discover the grounds and extent of his information. If such witness shows that he has any information on the subject, the testimony should be admitted and the jury not the judge determine what weight to attach to it. *Territory v. Paul*, 314.

When wife cannot be in favor of her husband on the trial of an indictment
See EVIDENCE.

See TRIAL.

WORDS.

"All debts due." See STATUTORY CONSTRUCTION, 2.

"Common-law jurisdiction." See JURISDICTION, 20.

"Game of chance." See POKER.

"Now growing and standing." See MORTGAGE.

"Unqualified opinion." See TRIAL, 3.

C. W. NOYES
Attorney At Law
RYEGATE, MONTANA

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C. W. NOYES
Attorney At Law
RYEGATE, MONTANA

